(9)

No. 06-102
Title: Sinochem International Co., Ltd., Petitioner
v.
Malaysia International Shipping Corporation
Docketed: July 24, 2006
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (04-1816)
Decision Date: February 7, 2006
Rehearing Denied: March 23, 2006

**Questions Presented**

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
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| Jun 8 2006 | Application (05A1134) granted by Justice Souter extending the time to file until July 21, 2006. |
| Jul 21 2006 | Petition for a writ of certiorari filed. (Response due August 23, 2006) |
| Aug 23 2006 | Brief of respondent Malaysia International Shipping Corporation in opposition filed. |
| Aug 31 2006 | Reply of petitioner Sinochem International Co., Ltd., filed. |
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| Sep 26 2006 | Petition GRANTED. |
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| Jan 9 2007 | Argued. For petitioner: Gregory A. Castanias, Washington, D.C.; and |

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No. 06-____

IN THE

# Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

*Petitioner,*

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

A divided panel of the Court of Appeals for the Third Circuit held that a district court must first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of *forum non conveniens*. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an already existing 2-4 split among the circuits, and invited this Court's review.

The question presented is:

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

There is no parent company or publicly held company owning 10% or more of Petitioner's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Sinochem International Co., Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Pennsylvania was issued on February 27, 2004, and is available at 2004 WL 503541 (E.D. Pa.) (App. 48a-69a). The subsequent opinion of that court, denying MISC's motion for reconsideration, was issued on April 13, 2004, and is available at 2004 WL 825466 (E.D. Pa.) (App. 37a-47a).

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006, and is reported at 436 F.3d 349 (App. 3a-36a). The Third Circuit's order denying rehearing and rehearing *en banc* is unreported (App. 1a-2a).

## JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006. App. 3a-36a. The Court of Appeals' order denying Sinochem's petition for rehearing *en banc* was issued on March 23, 2006. App. 1a-2a. On June 6, 2006, Petitioner timely filed an application to extend the time to file a petition for certiorari from June 21, 2006, to July 21, 2006. On June 8, 2006, Justice Souter granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution and Rule 4(k)(2) of the Federal Rules of Civil Procedure, which are set out in full in the Appendix to this Petition. App. 70a-71a.

## STATEMENT

This case centers on allegations of misconduct committed by one non-U.S. entity against another non-U.S. entity, where a significant number of the relevant acts, and most of the relevant witnesses and documents, are located in China. The dispute is being adjudicated in China, where China's courts have already determined that they have jurisdiction over the action initiated there by Sinochem. In the parallel action filed by MISC in federal district court, the court concluded that it had subject-matter jurisdiction over the action, but was unable to determine without discovery whether it had personal jurisdiction over the defendant, Sinochem. The court dismissed the suit on *forum non conveniens* grounds.

A divided panel of the Third Circuit vacated the judgment of dismissal and remanded for the district court to first establish conclusively whether it has personal jurisdiction over Sinochem before reaching the *forum non conveniens* issue. The court recognized that its decision deepened the split among the courts of appeals regarding whether a complete and conclusive determination of jurisdiction must precede a *forum non conveniens* dismissal. The court admitted that its rule does not "comport with the general interests of judicial economy" and may "ultimately result in a waste of resources," App. 26a, but concluded that its decision was compelled by this Court's precedents. The court of appeals nonetheless invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

### A. Background

In 2003, Petitioner Sinochem, a Chinese company, contracted with Triorient Trading Inc., an American company not a party to this action, for the sale of steel coils. Pursuant to that contract, a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The

purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law. App. 37a-38a, 49a.

The steel coils were loaded in Philadelphia onto a vessel, owned by Respondent MISC, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA), ch. 229, § 1, 49 Stat. 1207 (1936).[1] App. 38a, 49a.

### B. The Parallel Chinese and Federal District Court Proceedings

On June 8, 2003, Sinochem filed a petition for preservation of a maritime claim in the Guangzhou Admiralty Court; in response to Sinochem's petition, the court ordered the ship arrested. Upon its arrival at the Chinese port, MISC's vessel carrying Sinochem's cargo was in fact arrested by order of the Admiralty Court. The arrest was based on an allegation that MISC had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, MISC posted a U.S. $9,000,000 security bond to obtain release of its vessel. App. 38a, 50a. On July 2, 2003, Sinochem timely perfected its petition for preservation by filing a complaint in

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[1] This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean, the carrier, regarding the vessel. The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York arbitration with U.S. law" to apply to disputes under it. An opinion of the Chinese court in the related proceeding, however, stated that English law governed disputes under the charter party. App. 38a n.2, 66a.

the Chinese Admiralty Court, alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading. App. 50a.

While the Chinese action was pending, and after Sinochem had filed its petition for preservation of a maritime claim, MISC filed this suit in the United States on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the vessel's arrest, it negligently misrepresented "the vessel's fitness and suitability to load its cargo." App. 39a. Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and for "failure to observe the rules of [international] comity." App. 48a, 51a.

After filing the U.S. action, MISC challenged the jurisdiction of the Chinese courts to entertain Sinochem's Complaint. The Admiralty Court rejected that challenge; MISC appealed that rejection; and, on February 27, 2004, the Guangdong Higher People's Court (the "Chinese High Court") affirmed, concluding that the Chinese Admiralty Court had jurisdiction over the dispute. App. 6a. Specifically, the Chinese High Court rejected MISC's argument that the choice-of-law provisions of the bill of lading and the charter party controlled the case and that jurisdiction therefore properly rested with the London Maritime Arbitration Commission. App. 6a. That judgment was not further appealable. App. 6a n.6.

Back in the United States, the district court, on March 1, 2004, granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration of that ruling. The court determined that it had subject-matter jurisdiction over MISC's action pursuant to admiralty and maritime jurisdiction, *see* 28 U.S.C. § 1333, because the alleged tort, the seizure of the vessel at a port in China, occurred on navigable waters, and because the incident had a sufficient connection to maritime activity. App. 9a-15a.

As to personal jurisdiction, the court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. App. 55a-59a. However, the court stated that "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute," should the assertion of such jurisdiction be consistent with Sinochem's due process rights. App. 59a. The court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*. App. 60a, 67a.

In dismissing on the ground of *forum non conveniens*, the district court noted, without any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent-misrepresentation claim existed in the Chinese Admiralty Court. App. 67a-68a. The district court concluded that the "private interest" factors of the *forum non conveniens* determination, such as ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses, pointed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless of whether MISC's action continued in the United States. App. 64a, 68a.

The district court also observed that the "public interest" factor, the avoidance of unnecessary conflict-of-laws problems, also favored dismissal because Chinese law would apply to MISC's claim that Sinochem made negligent misrepresentations to the Chinese Admiralty Court. App. 65a-66a. Furthermore, as no United States' interests were implicated, the court held that dismissal for *forum non conveniens* was appropriate despite the deference that must be paid to the plaintiff's (in this case MISC's) choice of forum. App. 67a. The district court subsequently issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. App. 37a-47a.

### C. The Court of Appeals' Decision

A divided panel of the Court of Appeals for the Third Circuit affirmed the finding of admiralty jurisdiction, but concluded that the district court improperly decided the *forum non conveniens* motion prior to ascertaining whether it had personal jurisdiction over Sinochem. The panel majority, Judges Ambro and Alarcon (Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation), concluded that, while *forum non conveniens* is a non-merits ground for dismissal, the district court nonetheless should have determined whether personal jurisdiction existed prior to dismissing on *forum non conveniens* grounds because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction . . . and venue." App. 21a. The majority acknowledged that "Courts of Appeals have split on the issue," and chose the rule adopted by the Fifth, Seventh, and Ninth Circuits, while rejecting the rule that governs in the Courts of Appeals for the Second and D.C. Circuits. App. 16a-17a.

The majority candidly recognized that its decision "may not seem to comport with the general interests of judicial economy," and that it reached its decision not "without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. Believing itself bound by precedent, however, the majority invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

Judge Stapleton filed a dissenting opinion, observing that the court would "mak[e] no assumption of law declaring power" by deciding not to exercise whatever jurisdiction it may have, and therefore dismissal on *forum non conveniens* grounds without first determining its own jurisdiction is proper. App. 36a (internal quotation marks omitted). Judge Stapleton also noted that the majority's decision "mandates that the District Court subject Sinochem to discovery and

other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a.

Sinochem petitioned for rehearing *en banc*, which was denied. App. 1a-2a.

## REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three basic reasons, as set forth below:

*First*, the majority's decision deepens a sharp conflict in the circuits, and departs from this Court's precedent by concluding that *forum non conveniens* is not a threshold non-merits issue that can be determined in advance of personal jurisdiction.

*Second*, the Third Circuit's approach is inefficient and incorrect. Notably, the majority not only acknowledged that its decision undermines judicial economy, but also invited this Court's review to correct its decision and resolve the existing split. Furthermore, the rule adopted is inconsistent with the constitutional-avoidance doctrine.

*Third*, the question presented is important and is likely to recur with increasing frequency in today's globalized economy. This case provides an ideal vehicle for resolving that question. By reversing the Third Circuit, the Court can ensure that the longstanding doctrine of *forum non conveniens* reflects the appropriate respect and solicitude for other nations' judicial systems.

### I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *STEEL CO.* AND *RUHRGAS*, AND DEEPENS THE 2-4 SPLIT AMONG THE CIRCUITS

The decision below is contrary to this Court's decisions in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). Furthermore, as the majority acknowledged, "Courts of Appeals are split on the issue." App. 16a. The Third Circuit's decision, which conflicts with decisions of the

Second and D.C. Circuits, but aligns that court with the rule that controls in the Fifth, Seventh, and Ninth Circuits, exacerbates the existing split. Moreover, the Third Circuit's decision is based on the erroneous conclusion that *forum non conveniens* cannot be decided in advance of deciding jurisdiction.

### A. The Majority's Decision Is Contrary to This Court's Decisions in *Steel Co.* and *Ruhrgas*

In *Steel Co.*, 523 U.S. 83, this Court began establishing an adjudicative hierarchy—that is, the order in which the federal courts must rule on threshold issues, jurisdictional or otherwise. The Court in *Steel Co.* divided the world into two basic categories of issues: merits and jurisdictional; in turn, jurisdictional issues may be either discretionary or non-discretionary. Rejecting the concept of "hypothetical" jurisdiction that some lower courts had adopted, the Court held that disputes over Article III jurisdiction (such as constitutional standing) must be resolved before deciding the merits. *Id.* at 94 ("We decline to endorse ['hypothetical jurisdiction'] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.").

The Court in *Steel Co.* also distinguished between categories of cases where the threshold choice is between deciding merits or jurisdictional issues, and cases where the threshold choice is between discretionary and non-discretionary jurisdictional issues. *Id.* at 100-01 n.3. The Court suggested that there is no preferred hierarchy of decision-making between such jurisdictional issues. Citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court observed that in that case, "we declined to decide whether a federal court's pendent jurisdiction extended to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction." *Steel Co.*, 523 U.S. at 100 n.3. The Court also cited *Ellis v. Dyson*, 421 U.S. 426, 436 (1975), noting that

"the authoritative ground of decision" upon which the District Court had relied was *Younger* abstention, which has been treated as jurisdictional, rather than determining first whether there was a "case or controversy." *Steel Co.*, 523 U.S. at 100 n.3. The Court also acknowledged that statutory standing questions can be given priority over Article III questions. *Id.* at 97 n.2. In sum, while rejecting "hypothetical jurisdiction," the Court "acknowledged" that the cases allowing discretionary jurisdictional decisions to precede Article III inquiry "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* at 101.

In *Ruhrgas*, the Court elaborated on *Steel Co.*'s distinction between jurisdictional and merits questions, and held that, as between jurisdictional questions, "there is no unyielding jurisdictional hierarchy." 526 U.S. at 578. Thus, courts are not obligated to resolve subject-matter jurisdiction before personal jurisdiction, particularly where a "defect in subject-matter jurisdiction raises a difficult and novel question," and personal jurisdiction is "straightforward" and presents "no complex question[s]." *Id.* at 588. Reaffirming the point the Court made in *Steel Co.*—that it is permissible to select between non-discretionary and discretionary jurisdictional bases for dismissal—the Court explained that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585 (citing *Moor* and *Ellis*). Quoting approvingly from the D.C. Circuit opinion in *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998), *superseded by statute on other grounds*—with which the Third Circuit in this case explicitly disagreed—this Court posited that "'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85. Notably, the full quote in *Papandreou* refers to "non-

merits grounds such as *forum non conveniens* and personal jurisdiction . . . ." 139 F.3d at 255.

Similarly, in *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court approved of the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before addressing "whether the Eleventh Amendment forbids [the] statutory cause of action." *Id.* at 779. The reason underlying this rule applies with even greater force to the issue presented by this case of addressing *forum non conveniens* before addressing jurisdiction: "[T]here is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id.*

The circuits have divided in their interpretation of *Steel Co.* and *Ruhrgas*, disagreeing as to whether *forum non conveniens* is a threshold issue which can be decided prior to ascertaining a district court's jurisdiction. While this Court has yet to answer the question, the answer is suggested by *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994), and *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), which indicate that *forum non conveniens* fits squarely within the category of "threshold grounds for denying audience to a case on the merits," *Ruhrgas*, 526 U.S. at 585. "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening *venue* provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Am. Dredging Co.*, 510 U.S. at 453 (emphasis added). The Court emphatically stated that "the [*forum non conveniens*] doctrine is one of procedure rather than substance," *id.*, as it "does not bear upon the substantive right to recover, and is not a rule upon which . . . actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." *Id.* at 454. *See also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148

(1988) ("The District Court did not resolve the merits of [petitioner's] claim . . . . Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine.").

Consistent with the view that *forum non conveniens* is a "supervening venue provision," the Court in *Leroy* resolved an actual venue question prior to addressing the issue of personal jurisdiction: "Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the [original judicial district]." 443 U.S. at 180. The Court explained that while the "question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum," "when there is a sound prudential reason for doing so, . . . *a court may reverse the normal order of considering personal jurisdiction and venue*." *Id.* (emphasis added). This flexibility is allowed because "[n]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties." *Id.*[2]

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[2] To be sure, there appears to be some tension between *Ruhrgas*'s equating of subject-matter and personal jurisdiction, on the one hand, and the elevation of subject-matter jurisdiction over personal jurisdiction and venue, on the other hand, in *Leroy* and in this Court's recent decision in *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 950-51 (2006) ("[V]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience. . . . Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases."). This "broken circle" in the Court's own jurisprudence, *Steel Co.*, 523 U.S. at 97 n.2, further counsels in favor of this Court's resolution of the question presented.

The decision below, while purporting to agree with *Am. Dredging Co.* that *forum non conveniens* is not a merits issue, nevertheless concluded that personal jurisdiction must be verified before *forum non conveniens* dismissal, relying in part on *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). App. 21a-22a. In *Gulf Oil*, the Court enumerated the criteria for applying *forum non conveniens* and noted in passing that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507. However, *Gulf Oil* did not address the order in which to resolve preliminary, non-merits challenges in a case. And, most importantly, *Gulf Oil* long precedes *Am. Dredging Co.*, *Leroy*, as well as *Steel Co.*, *Ruhrgas*, and multiple other decisions holding that a court may indeed choose to decide threshold, non-merits issues before deciding whether it has jurisdiction, such as in *Moor*, 411 U.S. 693, *Ellis*, 421 U.S. 426, and other cases.[3] The court below nonetheless held that personal jurisdiction must be established prior to dismissal on *forum non conveniens* grounds.[4]

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[3] *See also Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("Nevertheless, application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger v. Harris*, or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction.") (internal citations omitted); *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004) (assuming the existence of Article III standing and addressing the "alternative threshold question" whether prudential requirements of standing were satisfied).

[4] In so concluding, the Third Circuit adopted the nomenclature of a law-review article, which posited three categories of issues: "jurisdictional," "merits," and issues that "fit[] somewhere between" pure jurisdictional issues and pure merits issues. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 321-22 (1999). The Third Circuit reasoned that *forum non conveniens* belongs to this new "third category." App. 18a. However, the majority

The decision of the Court of Appeals for the Third Circuit, therefore, is contrary to *Ruhrgas* and *Steel Co.* *Forum non conveniens* is a non-merits, "supervening venue provision," *Am. Dredging Co.*, *supra*, and, as such, can be decided prior to determining personal jurisdiction, *Leroy*, *supra*. The court of appeals' contrary conclusion, therefore, subverts the second principle of *Steel Co.* and *Ruhrgas*—that threshold non-merits questions may be addressed prior to deciding subject-matter or personal jurisdiction.

### B. The Decision Below Exacerbates the 2-4 Split Among the Courts of Appeals

This case presents this Court with a square and well-developed conflict between courts of appeals, which have disagreed in their application of *Steel Co.* and *Ruhrgas*. In reasoned and thorough opinions, two Courts of Appeals, the D.C. Circuit and the Second Circuit, have held that *forum non conveniens* can be decided prior to ascertaining jurisdiction. By contrast, the Third Circuit, upon examination of the competing viewpoints, joined the Fifth, Seventh, and Ninth Circuits, and held the opposite—that

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ignored the conclusion reached by the article, just two pages after the analysis upon which it relied, that it is proper to dismiss on *forum non conveniens* grounds prior to determining jurisdiction:

> [T]hese issues [non jurisdiction and non merits-related issues, *i.e.*, the "third category"] could also theoretically be reached in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although [it] would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

Idleman, *supra*, at 323. The article's analysis is entirely consistent with the analysis in *Papandreou*, on which this Court relied in *Ruhrgas*, and the article so recognizes. *Id.* at 332, 336. The Third Circuit, however, chose to ignore this part of the article's analysis.

*forum non conveniens* dismissal cannot precede a determination of jurisdiction. The majority's decision in this case candidly acknowledged the existence of this irreconcilable direct conflict: "Courts of Appeals have split on this issue." App. 16a. The conflict is squarely presented and ripe for this Court's adjudication.

The Third Circuit's decision conflicts with the D.C. Circuit's decision in *Papandreou*, which held that dismissal on *forum non conveniens* grounds prior to ascertaining subject-matter jurisdiction is permissible. Indeed, this Court in *Ruhrgas* relied on *Papandreou* to conclude that personal jurisdiction may be determined prior to subject-matter jurisdiction. The full quote from *Papandreou* states:

> [A]lthough subject-matter jurisdiction is special for many purposes (*e.g.*, the duty of courts to bring it up on their own), *a court that dismisses on other non-merits grounds such as forum non conveniens* and personal jurisdiction, *before finding subject-matter jurisdiction, makes no assumption of law-declaring power* that violates the separation of powers principles underlying *Mansfield* and *Steel Company*. Indeed, in *Steel Company*, the Court expressly endorsed [declining to exercise pendent jurisdiction, as in *Moor*, or abstaining under *Younger*, as in *Ellis*].

139 F.3d at 255 (emphasis added). The D.C. Circuit acknowledged that because *forum non conveniens* is "a deliberate abstention from the exercise of jurisdiction," it "may appear logically to rest on an assumption of jurisdiction." *Id.* However, based on principles of *Moor*, approved in *Steel Co.*, the D.C. Circuit explicitly concluded that *forum non conveniens* is "as merits-free as a finding of no jurisdiction." *Id.* at 255-56. Hence, dismissal on *forum non conveniens* grounds, without reaching the jurisdictional

issues presented by the Foreign Sovereign Immunities Act, was permissible. *Id.* at 256.[5]

The Third Circuit's decision also conflicts with the Second Circuit's decision in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002). There, the Second Circuit approved the district court's bypass of the statutory subject-matter jurisdiction issue in favor of first addressing the *forum non conveniens* question. *Id.* at 497. As a starting point, the Second Circuit cited *Steel Co.*'s observation that some of this Court's precedents have "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* The court then read *Steel Co.* as "barring the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question." *Id.* Then, the court endorsed the D.C. Circuit's reasoning in *Papandreou* that *forum non conveniens* is "merits-free" and hence, can be considered first, just as declination of exercise of pendent jurisdiction can be considered first. *Id.* at 498.

The Third Circuit's decision is, however, consistent with certain decisions of the Fifth, Seventh, and Ninth Circuits. App. 16a-17a (describing the split). In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005) (*per curiam*), the Fifth Circuit held that "the district court erred in dismissing the case on *forum non conveniens* grounds without first determining whether it had subject-matter jurisdiction." *Id.* at 652. The Fifth Circuit rejected the reasoning of the Second Circuit in *Monegasque* and of

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[5] *See also Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006) (relying on the court's prior holding in *Papandreou* to conclude that it was not necessary to resolve the question of the district court's subject-matter jurisdiction before dismissing the case as presenting a nonjusticiable political question).

the D.C. Circuit in *Papandreou*, believing that adjudicating the *forum non conveniens* question would be akin to assuming hypothetical jurisdiction, contrary to *Steel Co.* and *Ruhrgas*, and holding that, in any event, *forum non conveniens* is a merits-type issue. *Id.* at 653 ("the question of convenience of the forum is not completely separate from the merits of the action").[6]

The Seventh and Ninth Circuits, while not engaging in extensive discussions of the issue, have nevertheless staked out their positions. In *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), the Seventh Circuit endorsed the view that jurisdiction is a prerequisite for considering a *forum non conveniens* motion. The court observed that the presence of Chedid, one of the parties in the action, disrupted subject-matter jurisdiction as he was a "stateless" expatriate whose status "upsets complete diversity under § 1332(a)(3)." *Id.* at 805. The court noted that "[t]he district court therefore lacked jurisdiction to rule on Hill-Rom's *forum non conveniens* motion because Chedid was a party to this action." *Id.* The court dismissed Chedid as a dispensable party and affirmed the district court's dismissal of Hill-Rom on *forum non conveniens* grounds. *Id.* at 805-06.

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[6] Earlier Fifth Circuit cases had reached the same conclusion, albeit without detailed explanations. *See, e.g., Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542 (5th Cir. 1997) (rejecting defendants' invitation to rule on *forum non conveniens* before determining jurisdiction because "[t]he Supreme Court has . . . stat[ed] that 'the doctrine of [*forum non conveniens*] can never apply if there is absence of jurisdiction or mistake of venue'") (quoting *Gulf Oil Corp.*, 330 U.S. at 504); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1542 (5th Cir. 1991) ("We must determine, initially, whether the federal district court had jurisdiction over this removed action. If it did not have jurisdiction at the time it ruled on the question of *forum non conveniens*, we may not consider the issue and must direct the district court to remand the entire proceedings to state court.").

In *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003), the Ninth Circuit held that "[o]f course, the federal courts may decide [the *forum non conveniens*] issue only if we have jurisdiction over the case." *Id.* at 800 n.3.[7]

The Third Circuit rejected the approach of the Second and D.C. Circuits, and sided with the Fifth, Seventh, and Ninth Circuits, on the ground that the Second Circuit's *Monegasque* decision "cling[s]" to the discarded concept of hypothetical jurisdiction. App. 24a. As to the D.C. Circuit's *Papandreou* decision, the majority viewed it as internally inconsistent because the D.C. Circuit acknowledged that "'abstention may appear logically to rest on an assumption of jurisdiction.'" App. 25a (quoting *Papandreou*, 139 F.3d at 255). Thus, perceiving itself as "go[ing] a more certain way," the Third Circuit panel majority held that because district courts "either have jurisdiction to decide *forum non conveniens* motions or they do not," they must have jurisdiction before ruling on those motions. App. 26a.

The conflict on this question is well-developed: Courts of appeals on both sides of the issue have carefully examined relevant precedents of this Court, and have engaged a variety of interpretive tools to ascertain the correct rule. Little would be gained from further percolation. Indeed, the

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[7] Several years later, in *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1338 (2006), the Ninth Circuit concluded that issues of subject-matter jurisdiction should be decided prior to Rule 19 issues. *Id.* at 1106. Noting that "it is not always easy to determine whether a particular issue is the type of 'threshold' matter which, if decided adversely to the plaintiff, obviates the need to address other threshold questions," the Ninth Circuit pointed to the split between *Dominguez-Cota* and *Monegasque*. *Id.* The Ninth Circuit did not cite its own *Patrickson* decision, however. In any event, even though "the parties ha[d] not briefed the issue" of order of adjudication in *Wilbur*, *id.*, the decision in *Wilbur* was consistent with the approach taken in *Patrickson*.

conflict here is significantly more mature than the one presented in *Ruhrgas*, where the Court granted review based on a 1-1 split in the courts of appeals. *See* Petition for Writ of Certiorari at 11, *Ruhrgas AG v. Marathon Oil Co.* (1999), 526 U.S. 574 (No. 98-470).

## II. THE COURT OF APPEALS' DECISION LEADS TO MULTIPLE INEFFICIENCIES AND IS INCONSISTENT WITH THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE

There is no dispute that the rule adopted by the Third Circuit (and three other Courts of Appeals) is inefficient. Indeed, the majority recognized that its own rule "may not seem to comport with the general interests of judicial economy." App. 26a. The majority acknowledged that "[w]e do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. In his dissent, Judge Stapleton agreed and emphasized the extent of the inequities wrought by the majority's decision: It "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a. In fact, the majority, recognizing just how undesirable its rule is, but perceiving itself bound by precedent, expressly invited this Court to correct its decision: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

The incorrectness and inefficiency of the majority's rule is all the more obvious in light of the factors a court must consider in the *forum non conveniens* determination, as set forth in *Am. Dredging Co.* Relying on Justice Jackson's opinion in *Gulf Oil*, 330 U.S. at 508-09, the Court noted that "[a]n interest to be considered, and the one likely to be most pressed, is the private interest of the litigant." *Am. Dredging Co.*, 510 U.S. at 448. At its essence, the interest is in making the "trial of a case easy, expeditious and inexpensive." *Id.* (listing factors such as "the relative ease of access to sources

of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action"). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (*forum non conveniens* dismissal is appropriate where a "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience"). As Judge Stapleton explained, the majority's rule "subverts a primary purpose of the doctrine of *forum non conveniens*" of "protect[ing] a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." App. 33a.

But the decision below is even more troubling than that: The majority did not take into account the "public interest" side of the *forum non conveniens* equation. On the "public interest" side, courts must consider "[a]dministrative difficulties" that occur "when litigation is piled up in congested centers instead of being handled at its origin." *Am. Dredging Co.*, 510 U.S. at 448. *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is warranted where a chosen forum "is inappropriate because of considerations affecting the court's own administrative and legal problems"). Moreover, it is not fair to impose the burden of jury duty "upon the people of a community which has no relation to the litigation." *Am. Dredging Co.*, 510 U.S. at 448. It is also more appropriate to try a case in a jurisdiction whose law governs, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 448-49. In sum, the decision below is at odds with every one of the stated purposes of *forum non conveniens*.

Indeed, this case is a paradigmatic example of a suit that ought to be dismissed on *forum non conveniens* grounds, rather than forcing parties to engage in extensive discovery to determine the existence of personal jurisdiction over Sinochem—just so the district court can obtain the power to

dismiss the suit for *forum non conveniens*. As the district court observed, there is scarcely any relation of this litigation to the United States. *See* App. 66a ("The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates."). *But see* n.1, *supra*. Moreover, "the matter is expected to proceed in the Guangzhou court. . . . We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782." App. 43a.

Besides being inefficient and contrary to this Court's decisions in *Steel Co.* and *Ruhrgas*, *see* Part I(A), *supra*, the majority's decision is inconsistent with the principle of constitutional avoidance. This long- and well-established doctrine holds that federal courts should avoid bottoming their rulings on constitutional grounds if an alternative and non-constitutional ground is available. *See, e.g., Leroy*, 443 U.S. at 181 ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available.").[8] These cases "illustrate in practice the wisdom

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[8] *See also Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568 (1947) ("[T]his Court has followed a policy of strict necessity in disposing of constitutional issues."); *Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) (It is the "considered practice not . . . to decide any constitutional question in advance of the necessity for its decision."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans*, 415 U.S. at 547 n.12.

In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates Sinochem's due process rights under the Fifth Amendment. *See* App. 60a ("Under [Fed. R. Civ. P.] 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis."). As the Court explained in *Leroy*, where, as here, a long-arm statute authorizes jurisdiction over non-residents "consistent with the Constitution and laws of the United States," *see* Fed. R. Civ. P. 4(k)(2), a court undertaking a personal-jurisdiction analysis must necessarily "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. 443 U.S. at 181. Thus, "[a]s a prudential matter it is our practice to avoid unnecessary decision of [such] novel constitutional questions." *Id.* Indeed, in this case, the district court granted the motion to dismiss on *forum non conveniens* grounds only after examining in detail every basis for personal jurisdiction and concluding that only with further discovery would the court be able to ascertain whether it has personal jurisdiction over Sinochem. *See* App. 59a. Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional ground for decision, it is therefore most consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery, whether the

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latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) (same).

court has personal jurisdiction over Sinochem consistent with the Due Process Clause.

## III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS IMPORTANT AND RECURRING QUESTION

The question presented in this petition is recurring, important, and has widespread national and international consequences. This case presents an ideal vehicle for resolving this question.

*First*, as this Court has explained, the goal of the *forum non conveniens* doctrine is two-fold: not to impose undue burdens on litigants in a foreign forum, and not to impose undue burdens on United States' courts and its juries by allowing litigation of disputes having little or nothing to do with the United States. *Am. Dredging Co.*, 510 U.S. at 448-49. Whether these purposes can be furthered depends in large part on whether parties need to expend their own and the federal courts' time, effort, and resources on affirmatively establishing the existence of jurisdiction prior to moving to dismiss on *forum non conveniens* grounds. Putting what will typically be non-U.S. companies to the full-blown expense and burden of making jurisdictional demonstrations just to get out of court, even though the suit is ultimately dismissable on *forum non conveniens* grounds at the outset, undercuts the dual purposes of the *forum non conveniens* doctrine.

*Second*, as commerce is becoming increasingly more globalized, petitioners with only tenuous connections to the United States increasingly seek the aid of United States courts to resolve their disputes arising out of their business affairs abroad. Thus, resort to *forum non conveniens* doctrine is only going to increase in the future.

Commentators, whether or not they agree with the position of the Third Circuit, uniformly recognize the importance of this issue due to its international implications, as well as its effects on judicial economy: "Questions of

*forum non conveniens* have long arisen with some regularity in maritime cases and the tremendous growth in international commerce and interdependence since World War II has produced a considerable variety of kinds of cases in which arguably a foreign court would be a more convenient forum." 15 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 280 (2d ed. 1986 & Supp. 2005) (footnote omitted) (noting the split but endorsing the position that a court must ascertain its jurisdiction prior to dismissing on *forum non conveniens* grounds). *See also* David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 FORDHAM L. REV. 3147, 3186 (2006) ("[A] strict structuring of non-merits issues would serve to frustrate the very flexibility that makes *forum non conveniens* such a valuable tool for judicial consideration of internationally tinged disputes.").[9] *See generally* Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 269-70 (2000) (noting the importance of jurisdictional sequencing for judicial economy and endorsing a pragmatic approach over "rigidly applied rules of procedure").[10]

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[9] *See also* Ali Razzaghi, Dominguez-Cota v. Cooper Tire & Rubber Co.: *A Convenient Forum for Addressing Subject Matter Jurisdiction*, 74 U. CIN. L. REV. 689, 717 (2005) (This Court's "failure to categorically redefine the limits of the *Steel* rule has effectively opened Pandora's box to the speculating minds of courts and legal scholars. What if the jurisdictional issue is statutory? What if the competing issue is unrelated to the merits but is not personal jurisdiction? Because of these unresolved questions, the Court must reexamine its holdings in *Steel* and *Ruhrgas* and conclusively delineate the specific scope of the jurisdictional issue.").

[10] *See id.* at 269 ("Our courts need to be practical and efficient if they are to carry out their mission of serving the citizenry. . . . One can find within the accepted power of a court to determine its subject-matter jurisdiction, the ability to decide whether it can dismiss cases on

*Third*, whether it is appropriate to dismiss a suit on *forum non conveniens* grounds without requiring foreign parties to engage in discovery to establish jurisdiction (particularly where, as here, a suit is already proceeding in a foreign forum) directly implicates considerations of international comity. This Court has recognized that international comity is part and parcel of the *forum non conveniens* doctrine. *See, e.g., Am. Dredging Co.*, 510 U.S. at 464-67 (noting that *forum non conveniens* doctrine has been employed historically to ameliorate problems of international comity). And, in recent years, this Court has displayed solicitude to the practices and autonomy of other sovereigns. *See, e.g., Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 2178-80 (2005) (noting that, out of considerations of international comity, American law does not apply to the "internal affairs" of foreign-flagged vessels); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (relying on comity to hold that Congress did not intend the Sherman Act to apply to foreign conduct that caused foreign injury independent of any domestic effects).[11] At the same time, lower courts, in *forum non conveniens* and other related contexts, have extended due respect to the Chinese judicial system, as the district court here did in expressing its

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preliminary grounds when such dismissals will save time, energy and cost."); *id.* at 270 ("Once we accept the fact that *Steel Co.* and *Ruhrgas* have altered the jurisdictional landscape, the Court should consider broadening its approach even further to allow certain actions to proceed in the federal courts even though subject-matter jurisdiction has been questioned.").

[11] *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (refusing to recognize a new cause of action under the Alien Tort Statute for violation of the law of nations in part because of "the potential implications for the foreign relations of the United States . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

"confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter."[12] App. 67a n.11. The importance of such issues of international comity further counsels in favor of review here.

*Fourth* and finally, this case is an ideal vehicle for resolving the split among the courts of appeals. Both the majority and the dissent acknowledged the split and carefully analyzed the issue presented. And here, the question is presented in pure form unclouded by other issues, unlike, for example, in *Tyumen Oil Co. v. Norex Petroleum Ltd.*, 05-1070, *cert. denied*, 126 S. Ct. 2320 (2006) (Mem.). There, the Second Circuit did not explicitly rule on the *forum non conveniens* question, did not note the split, and did not even cite *Monegasque*. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005). Yet, the petition raised essentially the same *forum non conveniens* question presented here, along with three other mutually interrelated questions. Petition for Writ of Certiorari at i, *Tyumen Oil*

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[12] *See, e.g., Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 144-45 (S.D.N.Y. 2000) (holding, in a choice of law case, that the Court was bound to respect China's choice of public policy, apply Chinese law per New York's interest-based choice of law rules, and reject the argument that Chinese law violated New York public policy); *Lu v. Air China*, No. CV 92-1254 (RR), 1992 WL 453646, at *2 (E.D.N.Y. Dec. 16, 1992) (holding that government ownership of defendant corporation does not undermine the potential for fair resolution of the plaintiff's claim); *BP Chems., Ltd. v. Jiangsu Sopo Corp., Ltd.*, No. 4:99CV323 CDP, 2004 U.S. Dist. LEXIS 27855, at *36 (E.D. Mo. Mar. 29, 2004) (noting that in other cases "China has been found to be an adequate alternative forum"). *See also* Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 150 (2005) ("In fact, rule of law has become a major source of legitimacy for China's current government."); Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 137 (2005) (describing judicial reform in China and noting "particularly impressive" results in Shanghai).

*Co. v. Norex Petroleum Ltd.* (No. 05-1070), *available at* 2006 WL 431070. By contrast, this petition presents a single issue on which the court below ruled clearly and directly.

Moreover, there is no issue here as to the absence of an alternative forum, a key element of a number of the *forum non conveniens* cases on which the majority relied. *See, e.g.*, App. 23a ("[T]he Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone [, Inc.]*, 420 F.3d [702,] 705 [(7th Cir. 2005)]."). Here, however, the district court found, and the majority did not dispute, that the highest level of Chinese courts has already resolved any jurisdictional issues in the Chinese action in favor of the Chinese court's jurisdiction over both parties. App. 42a-43a. Thus, the record is clear that Chinese courts, as a result of the Chinese action, present an adequate alternative forum, whose jurisdiction has already been confirmed—and in which the action is *actually* proceeding.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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July 21, 2006

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 04-1816

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MALAYSIA INTERNATIONAL SHIPPING CORPORATION

Appellant

v.

SINOCHEM INTERNATIONAL CO. LTD.

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Before: SCIRICA, Chief Judge, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, STAPLETON* and ALARCÓN**, Circuit Judges

**SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC***

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

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* Honorable Walter K. Stapleton, Senior Judge, is limited to panel rehearing vote only.

** Honorable Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, is limited to panel rehearing vote only.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: March 23, 2006
CMD/cc: Diane B. Carvell
Ann-Michele G. Higgins, Esq.
Stephen M. Hudspeth, Esq.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION
Appellant

v.

SINOCHEM INTERNATIONAL CO. LTD.
No. 04-1815.

United States Court of Appeals, Third Circuit.

Argued June 7, 2005.

Opinion Filed Feb. 7, 2006.

As Amended Feb. 8 and March 23, 2006.

Before AMBRO, STAPLETON and ALARCON, Circuit Judges.

AMBRO, Circuit Judge.

Appellant Malaysia International Shipping Corporation ("MISC") appeals the District Court's dismissal, on *forum non conveniens* grounds, of its fraudulent misrepresentation action against Appellee Sinochem International Company Limited ("Sinochem"). We agree with the District Court that admiralty jurisdiction exists over this case. But because we believe the District Court should have determined whether it had personal jurisdiction before ruling on Sinochem's *forum non conveniens* motion, we vacate and remand.

## I. Factual Background & Procedural History

In 2003, Sinochem, a Chinese company, contracted with Triorient Trading Inc. ("Triorient"), an American company that is not a party to this action, for the purchase of a large quantity of steel coils. The coils were required to be loaded for shipment to China by April 30, 2003. Pursuant to the contract, Sinochem opened a letter of credit with its bank in China to provide security to Triorient for the purchase price

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Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

of the coils. To trigger payment under the letter of credit, Triorient was required to submit a valid bill of lading stating that the coils had been loaded on or before April 30, 2003. Sinochem's contract with Triorient specified that any dispute arising under it would be arbitrated under Chinese law.

Triorient sub-chartered a vessel (the M/V HANDY ROSELAND; hereafter the "Vessel") owned by MISC, a Malaysian company, to transport the steel coils to China.[1] Triorient then hired Novolog Bucks County, Inc. ("Novolog"), an American company also not a party to this action, to load the coils onto the Vessel at the Port of Philadelphia. A bill of lading dated April 30, 2003, was issued, acknowledging that the steel coils had been loaded, and the Vessel sailed for China.[2]

The bill of lading listed Triorient as the shipper, Sinochem as the receiver, and Pan Ocean as the carrier. On the back of the bill of lading were "Conditions of Carriage" specifying that the Hague Rules applied to it. This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean regarding the Vessel.[3] The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York law with U.S. arbitration" to apply to disputes under it.

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[1] The Vessel was chartered from MISC to Progress Bulk Carriers, which then sub-chartered it to Pan Ocean Shipping Co., Ltd. ("Pan Ocean"), which in turn sub-chartered it to Triorient.

[2] According to MISC's amended complaint, the Vessel docked at the Port of Philadelphia on April 25, 2003, and the loading of the coils began that same day. MISC asserts that the loading of the coils was complete on April 30, 2003, that loading of coils for a different shipper continued on May 1, 2003, and that the Vessel set sail on May 2, 2003.

[3] *Black's* provides a fuller definition. A charter party is "[a] contract by which a ship, or a principal part of it, is leased by the owner, esp. to a merchant for the conveyance of goods on a predetermined voyage to one or more places or for a specified period of time; a special contract between the shipowner and the charterer, esp. for the carriage of goods at sea." *Black's Law Dictionary* 251 (Bryan A. Garner ed., 8th ed.2004).

An opinion of the Chinese court in the related proceeding,[4] however, stated that English law governed disputes under the charter party.

On May 15, 2003, Sinochem filed an action in the Eastern District of Pennsylvania, in which it sought discovery, pursuant to 28 U.S.C. § 1782,[5] regarding various aspects of the Vessel's loading, the charter party, and the bill of lading for use in an "imminent foreign proceeding." The District Court granted this limited discovery.

On June 8, 2003, Sinochem petitioned the Guangzhou Admiralty Court in China (the "Chinese Admiralty Court") for preservation of a maritime claim against MISC and for the arrest of the Vessel when it arrived in China, claiming that MISC had fraudulently backdated the bill of lading to April 30, 2003. The Chinese Admiralty Court ordered the ship arrested that same day. The arrest of the Vessel was then carried out at the Huangpu Port in China. MISC posted security ($9,000,000), and the Vessel was released.

MISC filed the suit before us in the Eastern District of Pennsylvania on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the Vessel's arrest, it negligently misrepresented "the [V]essel's fitness and suitability to load its cargo." MISC further alleged that: (1) "[w]ith a minimal amount of investigation, Sinochem knew or otherwise should have known whether its cargo of steel had been loaded aboard the [V]essel on or by April 30, 2003"; (2) "Sinochem knew or should have known that other cargo interests and charterers would reasonably and justifiably rely on Sinochem's representation(s) that the vessel had not loaded the cargo as required"; and (3) MISC had sustained damages "[d]ue to the fraudulent

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[4] The related Chinese proceeding, brought by Sinochem in the Guangzhou Admiralty Court, is discussed below.

[5] The statute provides, in pertinent part, that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . ." 28 U.S.C. § 1782(a).

representations made by Sinochem and the resulting delay to the [Vessel] in the People's Republic of China caused by said representations. . . ."

On July 2, 2003, Sinochem filed a complaint with the Chinese Admiralty Court alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading (which had triggered payment by Sinochem to Triorient under the letter of credit's terms). Specifically, Sinochem alleged that May 1, 2003, should have been the loading date on the bill of lading. It asserted that the April 30, 2003 loading date allowed Triorient to negotiate successfully its payment and made it "de facto impossible for [it] to stop payment and refuse acceptance of the goods."

MISC moved to dismiss the Chinese Admiralty Court action on jurisdictional grounds. That Court denied MISC's motion, and the Guangdong Higher People's Court (the "Chinese High Court") affirmed[6] concluding that the Chinese Admiralty Court had jurisdiction.

The Chinese High Court rejected MISC's argument that the choice-of-law provisions of the bill of lading and the charter party controlled the case and that jurisdiction therefore properly rested with the London Maritime Arbitration Commission.[7] In rejecting MISC's contention that the Chinese Admiralty Court should not have exercised jurisdiction because MISC filed its U.S. action before Sinochem filed its Chinese action, the Chinese High Court determined as follows: "Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether [MISC] has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case."

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[6] The record suggests that the decision of the Chinese High Court cannot be appealed.

[7] As noted above, there is some confusion in the record whether the charter party called for the application of American or English law to disputes that arose under it.

While these events were occurring in the Chinese courts, proceedings continued in MISC's action in the Eastern District of Pennsylvania. Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and "for failure to observe the rules of [international] comity." The District Court granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration.

The District Court determined that it had subject matter jurisdiction over MISC's action pursuant to 28 U.S.C. § 1333 (admiralty and maritime jurisdiction) because the alleged tort—which the District Court identified as the seizure of the Vessel at a port in China—occurred on navigable waters and because the incident had a sufficient connection to maritime activity.

As to personal jurisdiction, the Court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. But it did state that, "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute." The Court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*.[8]

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[8] The District Court stated that

> [MISC]'s allegations with respect to other [Sinochem] enterprises in the country, as well as the undisputed facts averred with respect to . . . how the contract was carried out, render [MISC]'s claim [that the Court had personal jurisdiction over Sinochem] far from frivolous. Thus, we would refrain from ruling on whether the federal long-arm statute, Rule 4(k)(2), permits personal jurisdiction over [Sinochem] until after the parties had taken limited jurisdictional discovery. However, as the ensuing analysis shows, this discovery will not be necessary because we will dismiss this matter for forum non conveniens.

*Malaysia Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd.*, 2004 WL 503541, at *9 (E.D.Pa. Feb. 27, 2004).

In dismissing on *forum non conveniens* grounds, the District Court noted, in the absence of any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent misrepresentation claim existed in the Chinese Admiralty Court. The District Court then reasoned that the "private interest" factors relevant to its *forum non conveniens* determination (which include, *inter alia*, ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses) weighed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless whether MISC's action continued in the United States. It reasoned further that the relevant "public interest" factor—the avoidance of unnecessary conflict-of-laws problems—also weighed in favor of dismissal because Chinese law would apply to MISC's negligent misrepresentation claim.[9] In this context and because no American interests were implicated, the Court held that dismissal for *forum non conveniens* was appropriate despite the deference that must be paid to the plaintiff's (in this case MISC's) choice of forum.

The District Court also issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. In doing so, the Court declined to consider

[9] The District Court rejected MISC's argument that the choice-of-law provisions of the charter party and the bill of lading required the application of American law. The Court noted that the letter from Pan Ocean stating that American law applied to disputes under the charter party did not indicate "whether the charter party call[ed] for U.S. law to apply specifically to this type of negligence matter" and also seemed to be directed specifically at the question of which law would apply to the arrest of the Vessel. The Court determined as well that the bill of lading's choice-of-law provision was not implicated because MISC's negligent misrepresentation claim had nothing to do with the conditions of carriage of the cargo. As the dispute in this case (and the parallel Chinese proceeding) centered on the alleged backdating of the bill of lading that triggered Sinochem's payment to Triorient for the steel coils, the Court concluded that "the choice of law clause more applicable to this matter is that of the purchase contract of the steel coils, which calls for the use of Chinese law."

MISC's assertion that there were additional important witnesses—the people who were retained as surveyors to observe the loading of the Vessel—located in the United States because MISC had failed to establish the connection of those witnesses to this country in responding to the motion to dismiss even though the information was available to MISC at that time. Even if these witnesses were in the United States, the Court pointed out that China had "adequate means" of compelling their testimony. The Court also noted that the Chinese High Court's decision (which was issued after the decision dismissing MISC's action had been filed) affirming Chinese jurisdiction over Sinochem's claim reinforced the District Court's prior conclusion that it could not justify forcing the parties to litigate this case twice. Finally, the District Court reiterated its choice-of-law analysis.

MISC timely appealed the District Court's dismissal of its action, and the propriety of that dismissal is now before us.

## II. JURISDICTION

### A. *Subject Matter Jurisdiction*

Sinochem argues that subject matter jurisdiction does not exist here. Our review of whether the District Court properly exercised subject matter jurisdiction is plenary. *See, e.g., Levine v. United Healthcare Corp.*, 402 F.3d 156, 161 (3d Cir.2005); *Bracken v. Matgouranis*, 296 F.3d 160, 162 (3d Cir.2002).

As stated earlier, the District Court determined that it had admiralty jurisdiction over this action under 28 U.S.C. § 1333(1). That statute provides, in pertinent part, that "[t]he district courts shall have original jurisdiction . . . of[ ][a]ny civil case of admiralty or maritime jurisdiction. . . ." *Id.* "[A] party seeking to invoke federal admiralty jurisdiction pursuant to . . . § 1333(1) over a tort[10] claim must satisfy

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[10] As an initial matter, MISC contends that we should apply the test for admiralty jurisdiction over contract claims—rather than tort claims—because "[t]he substantive dispute in this case centers around a bill of lading." MISC Ltr. Br. at 3. Although the bill of lading is involved here, MISC did not allege that any of its terms were breached. Rather, MISC

conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); *see also Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 179 (3d Cir.1995) (*en banc*) (same). We address the location and connection tests in turn.

1. *The Location Test*

"A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534, 115 S.Ct. 1043. The tortious act at issue is Sinochem's alleged misrepresentations to the Chinese Admiralty Court that MISC backdated the bill of lading. Sinochem contends that because (1) these alleged misrepresentations occurred on land and (2) no injury was suffered on land caused by a vessel on navigable water, the location test is not met. We agree with Sinochem as to its second argument, but the resolution of whether the tort here occurred on land or on navigable water is not so clear cut.[11] In determining whether the tort occurred on navigable water, we consider the meaning of "tort" as used in the locality test.[12] In other words, is the tort only the alleged tortious act itself (here, the making of the alleged misrepresentations), or is it the alleged tortious act *as well as* the resulting injury? The Supreme Court has indicated the latter. In *Executive Jet*

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(continued...)

alleged that Sinochem *negligently misrepresented* actions MISC took with respect to the bill of lading. That claim is one of tort and has little to do with the provisions of the bill of lading itself. Thus, we analyze whether admiralty jurisdiction exists with reference only to the test for tort claims.

[11] We note that a tort need not have occurred in waters under the jurisdiction of the United States for us to exercise admiralty jurisdiction. *See, e.g., Neely*, 63 F.3d at 170, 179 (finding admiralty jurisdiction over a claim arising out of an accident that occurred in coastal waters off St. Lucia, an independent country).

[12] "Locality," as well as "situs," are used interchangeably with "location" in referring to the test or requirement.

*Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the Court noted that, "[u]nder the locality test, the tort 'occurs' where the alleged negligence took effect. . . ." *Id.* at 266, 93 S.Ct. 493 (describing problems with the traditional location test—which did not require that a connection with maritime activity must exist before admiralty jurisdiction is found). That statement was based on the Court's prior holding that "the whole, or at least the substantial cause of action, arising out of the wrong, *must be complete* within the locality upon which the [admiralty] jurisdiction depends—on the high seas or navigable waters." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36, 18 L.Ed. 125 (1866) (emphasis added).[13]

Our Court has never addressed this issue, but our sister Courts of Appeals that have considered it have adopted what the Fifth Circuit has termed an "'impact' analysis," *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 288 (5th Cir.1989), for determining where a tort occurred under the location test. Under that analysis, the place where a tort occurs is the place where the injury occurs. *See id.* at 588-89 (collecting cases) (holding that admiralty jurisdiction did not exist in a case alleging fraudulent inducement to enter a shipping contract because both the fraudulent inducement

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[13] The application of that rule in *The Plymouth* led to the Court's holding that—when a vessel anchored beside a wharf on the Chicago River caught fire (due to the negligence of those in charge of it) and the flames then spread to the wharf, destroying all the goods stored in the packing-houses there—there was no admiralty jurisdiction because, although the negligence occurred on navigable water, the injury occurred on land. 70 U.S. (3 Wall.) at 36.

The effect of this result was later negated by the Extension of Admiralty Jurisdiction Act, which created the second part of the location test by providing that "the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496, 496 (1948). Thus, for a particular class of cases—those with facts similar to *The Plymouth*—Congress has shifted the focus of the location test from where the injury occurred to where the injury was caused.

*and* the resulting injury occurred on land);[14] *see also Taghadomi v. United States*, 401 F.3d 1080, 1084 (9th Cir. 2005) (rejecting argument that the location test was not satisfied where the Coast Guard's alleged failure to act occurred entirely on land, but the resulting injury occurred on navigable waters, because it "ignore[d] the clear law of [that] circuit that the situs of a tort for the purpose of determining admiralty jurisdiction is the place where the injury occurs"); *Florio v. Olson*, 129 F.3d 678, 680 (1st Cir. 1997) ("In order to satisfy the 'location' or 'situs' requirement, a party must show either that the *injury occurred on navigable water* or that the injury was caused by a *vessel* on navigable water." (first emphasis added)).

This comports with *Executive Jet Aviation* and *The Plymouth* and also with our view of the meaning of "tort" in the context of our case. A tort claim is not complete until both a tortious act and an injury have occurred. Put another way, "negligence, of itself, furnishes no cause of action; it is *dammum absque injuria* [damage without injury]." *The Plymouth*, 70 U.S. (3 Wall.) at 36. Accordingly, we too adopt the rule that, for purposes of the location test, a tort occurs where the alleged tortious act takes effect.

Applying that rule here, we conclude easily that the test is met. The injury resulting from Sinochem's alleged misrepresentations to the Chinese Admiralty Court was the seizure of the Vessel at a port in China. That the seizure

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[14] In *Kuehne & Nagel*, the Fifth Circuit provided several examples of when the location test is met under the "impact analysis," stating:

> This court has applied the "impact" analysis in several situations. We found situs present where a gun was fired from land, but the bullet struck and injured a poacher on a vessel. Situs was also satisfied where the components of a ship's navigational system, negligently manufactured on land, caused a collision on the high seas. And we found the situs element established where workers who contracted asbestosis were exposed to asbestos both on land and on vessels lying in navigable waters.

874 F.2d at 288 (citations omitted).

occurred on navigable waters is undisputed. Thus, the District Court's determination that, "[a]s the seizure occurred on navigable water, at a port in China, [MISC]'s Complaint satisfies the locality prong" is correct. We therefore turn to whether the alleged tort bears a sufficient connection to maritime activity to warrant the exercise of admiralty jurisdiction.

2. *Connection with Maritime Activity Test*

The second prong of the admiralty jurisdiction test for tort claims has two components: (1) "whether the incident involved was of a sort with the potential to disrupt maritime commerce"; and (2) whether there is a substantial relationship to traditional maritime activity, *i.e.*, "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart*, 513 U.S. at 538-40, 115 S.Ct. 1043.

a. *Potential Disruptive Effect on Maritime Commerce*

The District Court concluded that, regardless whether the incident here was characterized as "the improper loading of cargo on a vessel docked at a port on navigable waters or the arrest of a vessel docked in navigable waters," it had a "potentially disruptive impact on maritime commerce." We believe that the incident before us is better characterized as Sinochem's alleged misrepresentations to the Chinese Admiralty Court that led to the arrest of the Vessel at port. Yet, we agree that, no matter how we define the incident, it had the potential to disrupt maritime commerce—and in fact did so, as the alleged misrepresentations resulted in the Vessel's seizure. (And we note that making misrepresentations about another party's conduct with respect to the shipment of goods and a bill of lading is generally likely to disrupt maritime commerce as between those two parties.) Thus, the first component of the connection with maritime activity inquiry is met.

b. *Substantial Relationship to Traditional Maritime Activity.*

"[W]hether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity" is not a concept cabined narrowly or rigidly. *Neely*, 63 F.3d at 179 (internal quotation marks omitted); *see also Sisson v. Ruby*, 497 U.S. 358, 364, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990) ("Our cases have made clear that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."). The Supreme Court has held that a "broad perspective" should be used in determining whether the activity underlying a claim has the requisite relationship to maritime activity, and has declined to hold that navigation is the only activity that could satisfy the substantial relationship test. *Sisson*, 497 U.S. at 367, 110 S.Ct. 2892.[15]

The District Court held that, under *Sisson*, the activity in this case met the substantial relationship test because,

> if activities undertaken by vessels have a substantial relationship to maritime activity, it logically follows that activities carried out *to or against* vessels would also have a substantial relationship to maritime activity. As such, the very serious act of arresting a vessel at a port sufficiently relates to maritime activity to establish subject matter jurisdiction.

*Malaysia*, 2004 WL 503541, at *4 (emphasis in original).

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[15] In *Sisson*, the Court emphasized that

> [t]he fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce, and we have said that that interest cannot be fully vindicated unless *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The need for uniform rules of maritime conduct and liability is not limited to navigation, ***but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.***

497 U.S. at 367, 110 S.Ct. 2892 (first emphasis in original) (citations and internal quotation marks omitted).

Per *Sisson* and *Neely*, our focus in this inquiry must also include the activity *giving rise* to the seizure of the Vessel. *See Sisson*, 497 U.S. at 364, 110 S.Ct. 2892; *Neely*, 63 F.3d at 179.

As stated earlier, Sinochem's alleged misrepresentations gave rise to the seizure of the Vessel. Looked at narrowly, it may seem that the act of making representations (or misrepresentations, as the case may be) to a court has no connection with maritime activity. But looking at Sinochem's alleged conduct broadly, as we must, it was clearly undertaken with the purpose of having the Vessel seized.[16] Asking a court to have a vessel arrested, as Sinochem did here, is a well-established method of granting an admiralty court power to exercise authority over a ship, *see Reed v. S.S. Yaka*, 307 F.2d 203, 204 (3d Cir.1962), *rev'd on other grounds*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963), and thus has a substantial relationship to traditional maritime activity.[17]

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Because both prongs of the test for determining whether admiralty jurisdiction over a tort claim exists are met here, we now turn to another jurisdiction-related inquiry in this case—the propriety of the District Court's decision to dismiss on *forum non conveniens* grounds without first

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[16] With this statement we do not mean to imply that Sinochem's purpose was not legitimate. That issue, of course, goes to the underlying merits of MISC's fraudulent misrepresentation claim, and the resolution of that claim is not before us.

[17] Finally, we note that the activity here is much closer to the types of activity the Supreme Court has found to satisfy the substantial relationship test than to those it has found to be too attenuated, as those were not even aimed at vessels. *Cf. Grubart*, 513 U.S. at 540, 115 S.Ct. 1043 ("Navigation of boats in navigable waters clearly falls within the substantial relationship, [and] storing them at a marina on navigable waters is close enough, whereas in flying an airplane over the water, as in swimming, the relationship is too attenuated." (citations omitted)).

ascertaining that it had personal jurisdiction over the parties.[18]

**B. *Personal Jurisdiction***

As discussed above, the District Court held that it did not have personal jurisdiction over Sinochem under Pennsylvania's long-arm statute but that, with limited jurisdictional discovery, MISC might be able to establish personal jurisdiction over Sinochem based on the federal long-arm statute. MISC contends that the District Court erred by not allowing it this additional discovery, and thus not determining whether personal jurisdiction existed, before dismissing its complaint on the basis of *forum non conveniens.* This issue—whether courts must decide jurisdictional issues, here personal jurisdiction, before ruling on *forum non conveniens*—is one of first impression in our Circuit.[19]

Courts of Appeals have split on the issue. *Compare In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-98 (2d Cir.2002) (holding that courts may pass over jurisdictional questions and decide a *forum non conveniens* issue), *and In re Papandreou*, 139 F.3d 247, 255-56 (D.C.Cir.1998) (same), *superseded by statute on other grounds, with Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 654 (5th Cir.2005) (*per curiam*) (holding that they may not). These are the three cases most often referred to, but the Seventh and the Ninth Circuits have also reached the same result as the Fifth Circuit's *Dominguez-Cota* opinion. *See*

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[18] As we have determined that admiralty jurisdiction exists, we need not address MISC's contention that federal question and diversity jurisdiction are present here as well. We note that MISC's counsel decided not to press diversity jurisdiction at oral argument—a wise decision, as these alternative arguments rested (at best) on shaky ground.

[19] We note that *forum non conveniens* is a limited doctrine, typically applying when the alternative forum is in a foreign country or a state court. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828, at 278-80 (2d ed. 1986). This is because 28 U.S.C. § 1404(a) covers inconvenient forum issues within the federal court system. *Id.*

*Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir.2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003); *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997).

We tackle our analysis in two parts. First, we decide whether *forum non conveniens* is a non-merits grounds for dismissal. Second, we decide whether a district court must establish both subject matter jurisdiction and personal jurisdiction before ruling on a *forum non conveniens* issue.

1. *Is Forum Non Conveniens Merits Related?*

The Supreme Court has held that courts may not assume "hypothetical jurisdiction" to resolve a case on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In other words, an actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case. The Court later concluded that this principle applied equally to personal jurisdiction because "[p]ersonal jurisdiction, too, is an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (ellipsis in original) (internal quotation marks omitted). The Court held, however, that the existence of subject matter jurisdiction need not be decided before personal jurisdiction, stating that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585, 119 S.Ct. 1563. While *Steel Co.* required rulings on subject matter jurisdiction before rulings on the merits, the *Ruhrgas* Court held that it did not "dictate a sequencing of jurisdictional issues." *Id.* at 584, 119 S.Ct. 1563. In other words, a dismissal on "non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying [*Steel Co.*]" *Id.* at 584-85, 119 S.Ct. 1563 (quoting *In re Papandreou*, 139 F.3d at 255) (omission in original).

In the wake of *Steel Co.* and *Ruhrgas*, one commentator posits that there are three categories of issues, only two of which have set decisional priorities. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L.Rev. 235, 321 (1999). The first category includes jurisdictional issues that "cannot be bypassed" because Article III of our Constitution requires that they be addressed; the second deals with merits-related issues, which "cannot be reached without first verifying jurisdiction." *Id.* The third category fits somewhere between these first two. It comprises two subgroups of issues: (1) jurisdictional issues that do not have to be reached before the merits and (2) "issues that are neither jurisdictional nor merits-related." *Id.* at 322, 321-22. This first subgroup includes non-Article III jurisdictional issues like statutory standing. *Id.* at 322 n. 361; *see also id.* at 297-99. The second subgroup includes "procedural, remedial, or evidentiary" issues. *Id.* at 322 n. 364.

Within this framework, *forum non conveniens* is not a constitutional Article III jurisdictional issue, so we address whether it fits within the second or the third category. The D.C. Circuit—in a pre-*Ruhrgas* case—reasoned that what *Steel Co.* put "beyond the power of courts lacking jurisdiction [was] adjudication on the merits, the act of deciding the case," so that courts could still dismiss cases on "other non-merits grounds such as forum non conveniens and personal jurisdiction." *In re Papandreou*, 139 F.3d at 255. Accordingly, it held that *forum non conveniens* was "as merits-free as a finding of no jurisdiction." *Id.*

But the Fifth Circuit reached the opposite conclusion. It held that it could not "characterize forum non conveniens as a 'non-merits' issue akin to personal jurisdiction." *Dominguez-Cota*, 396 F.3d at 654. We disagree, as we believe that *forum non conveniens* is a non-merits ground for dismissal.

The Fifth Circuit based its holding on two cases, a Supreme Court case—*Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988)—and a 1986

Fifth Circuit case—*Partrederiet Treasure Saga v. Joy Manufacturing Co.*, 804 F.2d 308 (5th Cir.1986). *See Dominguez-Cota*, 396 F.3d at 653 (citing *Biard* and *Partrederiet* ). These two cases concern on their face whether *forum non conveniens* falls within the collateral-order doctrine (which allows otherwise non-final orders to be "immediately appealable under § 1291," *Biard*, 486 U.S. at 527, 108 S.Ct. 1945). One of the elements of the collateral-order doctrine is a requirement that the order be "completely separate from the merits." *Id.* The Supreme Court (and the Fifth Circuit) both determined that, "in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute." *Id.* at 528, 108 S.Ct. 1945; *see also Partrederiet*, 804 F.2d at 310 (same).

These cases are telling, to be sure, but not dispositive, for four reasons. First, in a context other than the collateral-order doctrine, both the Supreme Court and the Fifth Circuit have held *forum non conveniens* dismissals not to be rulings on the merits. In a case decided less than a month before *Biard*, the Supreme Court discussed the Anti-Injunction Act in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). It held that the "District Court did not resolve the merits of [petitioner's] claim.... Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine." *Id.* at 148, 108 S.Ct. 1684. In a 2003 opinion citing *Chick Kam Choo* and discussing the Anti-Injunction Act and claim preclusion, the Fifth Circuit held that an "f.n.c. [*forum non conveniens*] dismissal ... does not resolve the substantive merits." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 677 (5th Cir.2003). Instead, "[t]he principle of f.n.c .... contemplates resolving the merits in another forum." *Id.* at 679. The *Vasquez* Court also held that a dismissal under *forum non conveniens* could be construed as a Federal Rule of Civil Procedure 41(b) dismissal for lack of jurisdiction or improper venue—*i.e.*, not a dismissal on the merits. *Id.* at 678.

Second, we have before discussed *Biard* and, in that context, minimized the entanglement it mentions between the merits and *forum non conveniens*. Although a "district court must immerse itself to a certain degree in the facts of the case. . . ., [it] must do no more than delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 181 (3d Cir.1991). We further noted that "[n]othing in [*Biard*] . . . directs a court to assess the relative strength of the parties' arguments and to select one paramount issue." *Id.* at 182. Thus, an entanglement in the facts does not suffice to make *forum non conveniens* grounds a merits-related issue.

Third, also following from the first reason, language in the Supreme Court's 1994 *American Dredging* opinion suggests that *forum non conveniens* is not a merits-based issue, but simply a procedural one. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994) (noting that "the doctrine is one of procedure rather than substance"); *see also id.* at 454 n.4, 114 S.Ct. 981 (stating that "*forum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum"). In doing so, it equated *forum non conveniens* with venue: "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision. . . . But venue is a matter that goes to process rather than substantive rights—determining which among various competent courts will decide the case." *Id.* at 453, 114 S.Ct. 981. The Court further distinguished *forum non conveniens* from other issues. "Unlike burden of proof . . . and affirmative defenses such as contributory negligence . . ., *forum non conveniens* does not bear upon the substantive right to recover. . . ." *Id.* at 454, 114 S.Ct. 981.

Fourth, that *forum non conveniens* is not merits based has the most support at the federal appellate level. The First Circuit also agrees with this notion. Mentioning *Papandreou*, it discussed the defendants' "non-merits-based defenses . . . (including insufficiency of process, forum non

conveniens, and lack of in personam jurisdiction)." *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 294 (1st Cir.2005). We therefore join three (First Circuit, Second Circuit, *see Monegasque*, 311 F.3d at 498, and D.C. Circuit, *see Papandreou*, 139 F.3d at 255) of the four Circuits to have weighed in on the issue, and part with the Fifth Circuit.

This background demonstrates that *forum non conveniens* is squarely in the third category of issues discussed above. Neither a constitutional Article III jurisdictional issue nor a substantive, merits-related issue, *forum non conveniens* is a non-jurisdictional, non-merits procedural issue. We next decide whether jurisdiction must be determined before *forum non conveniens*.

### 2. *Can a Court Decide Forum Non Conveniens Before Establishing Jurisdiction?*

Should the District Court have determined whether jurisdiction existed before dismissing on *forum non conveniens* grounds? We hold yes for two reasons.

First, the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) ("[T]he doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction[20] or mistake of venue."), *superseded by statute on other grounds*. Through *forum non conveniens*,

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[20] We admit that it is not facially apparent that the *Gulf Oil* Court was referring to both subject matter and personal jurisdiction when it said "jurisdiction." The Court has before noted that "[j]urisdiction . . . is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90, 118 S.Ct. 1003 (internal quotation marks omitted). But three paragraphs before the line quoted above from *Gulf Oil*, the Court discussed the alternative forum desired by the defendant and noted that the state and federal courts there were "able to obtain jurisdiction of the defendant." *Gulf Oil*, 330 U.S. at 503, 67 S.Ct. 839. This almost certainly alludes to personal jurisdiction. The Supreme Court also noted that *forum non conveniens* "presupposes" that the court deciding the issue is one in which the "defendant is amenable to process." *Id.* at 507, 67 S.Ct. 839. This also refers to personal jurisdiction.

a district court "may decline to exercise its jurisdiction, *even though the court has jurisdiction and venue*, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir.1993) (emphasis added); *see also Am. Dredging*, 510 U.S. at 447-48, 114 S.Ct. 981 (same); *Altmann v. Republic of Austria*, 317 F.3d 954, 972 (9th Cir.2002) (same); *Rustal Trading US, Inc. v. Makki*, 17 Fed.Appx. 331, 335 (6th Cir.2001) (unpublished) (same); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 947 (1st Cir.1991) (Breyer, C.J.) (same). Stated differently, but with the same requirement of jurisdiction, we have held that the ultimate inquiry of *forum non conveniens* "is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice." *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 613 (3d Cir.1966); *see also Hoffman v. Goberman*, 420 F.2d 423, 426 (3d Cir.1970) (same).

–*Forum non conveniens* allows a court (with jurisdiction and proper venue) to decline the exercise of its jurisdiction in favor of letting another court (also with jurisdiction and venue) hear the case. In this way, jurisdiction—both subject matter and personal jurisdiction—is a *sine qua non* for *forum non conveniens*. *See, e.g., Gulf Oil*, 330 U.S. at 506-07, 67 S.Ct. 839 ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."); *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 704 (7th Cir.2005) (discussing the need for an alternative forum with jurisdiction and stating "it is tough to argue that the present forum [*i.e.*, the one deciding the *forum non conveniens* motion]—which by definition has both subject matter jurisdiction and personal jurisdiction over all parties—is 'out of all proportion to plaintiff's convenience,' when the plaintiff has no other options"); *Black's Law Dictionary* 680 (Bryan A. Garner ed., 8th ed.2004) (defining *forum non conveniens* as the "doctrine that an appropriate forum—even

though competent under the law—may divest itself of jurisdiction if . . . it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place"); Jack H. Friedenthal *et al.*, *Civil Procedure* § 2.17, at 91-92 (4th ed.2005) (noting that *forum non conveniens* "permits a court having jurisdiction over an action to refuse to exercise its jurisdiction when the litigation could be brought more appropriately in another forum," and stating that "[i]t must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court"); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828, at 287 (2d ed. 1986) ("The doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter and personal jurisdiction and is a proper venue. If the case is wanting in any of these respects, the action should be dismissed on that ground without reaching questions of *forum non conveniens*." (footnote omitted)). The need for jurisdiction in both forums (the forum deciding the *forum non conveniens* issue and the alternative forum) is so important that the Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone*, 420 F.3d at 705.

Second, at least two other Circuit Courts, and the Supreme Court (inferentially), have determined that *forum non conveniens* dismissals are invalid if the district court does not have subject matter jurisdiction. The Seventh Circuit in *Kamel* affirmed the District Court's *forum non conveniens* dismissal. *Kamel*, 108 F.3d at 806. But one of the parties, Chedid, was an American expatriate with a Saudi Arabian domicile; his expatriate status destroyed complete diversity under 28 U.S.C. § 1332(a). *Id.* at 805. Therefore, the Seventh Circuit held, the District Court "lacked jurisdiction to rule on [the defendant's] *forum non conveniens* motion because Chedid was a party to this action." *Id.* Because appellate courts have the power to dismiss dispensable

parties to salvage diversity jurisdiction, the Court dismissed Chedid "to attain subject matter jurisdiction to affirm [the] *forum non conveniens* dismissal." *Id.* at 806. By so doing, it made clear that *forum non conveniens* dismissals are of no effect unless the district courts have jurisdiction. Only by dismissing Chedid and restoring jurisdiction by fiat could the Circuit Court there deal with the *forum non conveniens* dismissal.

Likewise, in 2001 the Ninth Circuit reversed a *forum non conveniens* dismissal because the District Court lacked subject matter jurisdiction. *See Patrickson*, 251 F.3d at 800 n.3 ("As the district court recognized, such claims may raise serious questions of forum non conveniens under federal and state law. Of course, the federal courts may decide that issue only if we have jurisdiction over the case."). The District Court had dismissed some class action cases for *forum non conveniens*, *id.* at 798, but the Ninth Circuit held that the District Court had no federal subject matter jurisdiction, *id.* at 808. Accordingly, the Court reversed the District Court's judgment and remanded the case with instructions to remand it to a state court. *Id.* at 808-09. The Supreme Court agreed that there was no subject matter jurisdiction and affirmed the Ninth Circuit's reversal of the *forum non conveniens* dismissal. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003).

At least one District Court within our Circuit has also followed this approach in the context of personal jurisdiction. *Henkel Corp. v. Degremont, S.A.*, 136 F.R.D. 88 (E.D.Pa.1991), held, in a case where discovery on issues of personal jurisdiction was ongoing, that the defendants' *forum non conveniens* motion could not be decided because the Court had "not determined whether [it had] jurisdiction over the parties." *Id.* at 98.

What of the cases holding otherwise? The Second Circuit's *Monegasque* opinion ignores the nature of *forum non conveniens* and the cases cited above by clinging to the principle of hypothetical jurisdiction. *See Monegasque*, 311 F.3d at 497. First, in the face of the Supreme Court's

disapproval of this principle in *Steel Co.*, it claims to retain hypothetical jurisdiction unless the "potential lack of jurisdiction is a constitutional question." *Id.* (internal quotation marks omitted). It then avoids further analysis by quoting liberally from the D.C. Circuit's *Papandreou* opinion. *See id.* at 498.

*Papandreou* states that *forum non conveniens* "does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction." *In re Papandreou*, 139 F.3d at 255. As a court can only abstain from jurisdiction it already has, if it has no jurisdiction *ipso facto* it cannot abstain from the exercise of it. The *Papandreou* Court appears to concede as much when it mentions that "abstention may appear logically to rest on an assumption of jurisdiction. . . ." *Id.* And again it exposes the weakness of its position in a footnote, where it admits that "[a]ny such *forum non conveniens* dismissal [*i.e.*, one decided without first establishing jurisdiction] could not, however, be subject to conditions,[21] *e.g.*, a condition that

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[21] A conditional dismissal is one in which "the district court dismisses the case only if the defendant waives jurisdiction and limitations defenses, and only if it turns out that another court ultimately exercises jurisdiction over the case." *Ford v. Brown*, 319 F.3d 1302, 1310 (11th Cir.2003). This allows the district court to "reassert jurisdiction in the event that the foreign court refuses to entertain the suit." *Id.* Conditional dismissals provide protection to plaintiffs by ensuring that an adequate alternative forum will exist. *See, e.g., Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir.2001); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1352 (1st Cir.1992); *Pain v. United Techs. Corp.*, 637 F.2d 775, 794 (D.C.Cir.1980), *overruled on other grounds by Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *cf.* Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of* Forum Non Conveniens *in the United States, the United Kingdom, and Germany*, 16 Loy. L.A. Int'l & Comp. L.J. 455, 473-74 (1994) (discussing the use of conditional dismissals to prevent injustice to the non-movant but noting that dismissals are still practically outcome determinative). If a court is not able to grant a conditional dismissal, the plaintiff could find itself without any guaranteed forum. Moreover, if that plaintiff comes back to the transferring forum to refile, and the transferring forum subsequently finds that it has no jurisdiction over the suit, the judicial economy claimed by

defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction." *Id.* at 256 n.6.

We go a more certain way. District courts either have jurisdiction to decide *forum non conveniens* motions or they do not. As such, we hold that they must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits.

We do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers. Also, we recognize that this result may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources if the case is again dismissed before the substance of MISC's claim is decided. But precedent, logic, and the very terms of the *forum non conveniens* doctrine dictate this result. If the Supreme Court wishes otherwise, we leave that determination to it. For now, it tells us, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101, 118 S.Ct. 1003. Without jurisdiction over subject matter and parties, we are pundits, hardly an optimal calling for appellate courts.

Here we have already decided subject matter jurisdiction, but we must take our inquiry one step further. We must decide whether the District Court has adequately addressed personal jurisdiction.

3. *Did the District Court Adequately Address Personal Jurisdiction?*

Sinochem urges that, regardless of the discussion above, we should nonetheless conclude that the District Court

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(continued...)

proponents of the "*forum non conveniens* without jurisdiction" dismissal ceases to exist.

adequately addressed personal jurisdiction before moving to its *forum non conveniens* analysis, contending that the District Court determined that MISC had made a *prima facie* showing of personal jurisdiction. When a defendant raises the possible lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that it exists and "present[ing] a *prima facie* case for the exercise of personal jurisdiction by establishing with reasonable particularity sufficient contacts between the defendant and the forum state." *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992) (internal quotation marks omitted). Here, with regard to the potential existence of personal jurisdiction over Sinochem under the federal long-arm statute, the District Court stated only that MISC's "allegations with respect to [Sinochem] enterprises in this country, as well as undisputed facts averred with respect to how the contract was carried out, render [MISC]'s claim far from frivolous."

This general statement does not indicate that MISC met its burden of establishing sufficient contacts with "reasonable particularity." Rather, it points out only the possibility that MISC *might* be able to do so and that there were some facts that supported MISC's claim. Consequently, we hold that the District Court's general statement as to the possibility that personal jurisdiction might exist did not determine whether MISC has made a *prima facie* case for personal jurisdiction, let alone constitute an ultimate conclusion that it did exist.[22] *See Mellon Bank*, 960 F.2d at 1226 (citing *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 150 (3d Cir.1992)). We therefore remand this case for a decision on personal jurisdiction (and, of course, whatever jurisdictional discovery may be necessary for such a decision).[23]

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[22] There was no waiver of personal jurisdiction in this case, but such a waiver could substitute for the Court's determination on personal jurisdiction. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

[23] Given this conclusion, we express no opinion regarding MISC's argument that the District Court abused its discretion in dismissing its complaint on the basis of *forum non conveniens*.

## III. Response to the Dissent

Our colleague has filed a thoughtful dissent with several plausible arguments. To stem any confusion, we respond to those arguments.

1. The dissent argues that our holding "subverts a primary purpose of the doctrine of *forum non conveniens*," defining (without citation) that primary purpose as "protect[ing] a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." This overdramatizes the doctrine, as most litigation involves unwanted effort and expense for the defendant. The doctrine's purpose has elsewhere been described as a district court—with jurisdiction and venue—declining to exercise that jurisdiction "when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." 17 James Wm. Moore, *Moore's Federal Practice* § 111.70, at 111-208 (3d ed.2005) (internal quotation marks omitted); *see also* Friedenthal *et al.*, *supra*, § 2.17, at 91 (noting that "a correct, but inconvenient, tribunal" may refuse to exercise its jurisdiction when "the forum may have little to no connection with the significant events forming the basis of the lawsuit" or when "the litigation could be brought more appropriately in another forum"). Our holding coincides with this purpose; it ensures that both forums are proper and allows for choice between them.

2. The dissent quotes *Ruhrgas* for the proposition that the rejection of hypothetical jurisdiction is not pertinent here:

> "[A] court that dismisses on . . . non-merits grounds . . . before finding subject-matter jurisdiction, [however] makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . . *Steel Company.*"

(alterations and omissions in original).

This quotation suggests that a district court's dismissal on non-merits grounds of any type does not violate the

prohibition against hypothetical jurisdiction. But while the first omission in the quotation was as it appeared in *Ruhrgas*, the second one obscures the fact that the Supreme Court restricted its statement to "'non-merits grounds such as . . . personal jurisdiction,'" *Ruhrgas*, 526 U.S. at 584, 119 S.Ct. 1563 (omission in original). We held in section II.B.1 above that *forum non conveniens* was a non-merits issue, but of a different type from personal jurisdiction—a holding the dissent does not dispute. Thus, we do not agree that *Ruhrgas* makes the principle of hypothetical jurisdiction inapplicable in this context.

3. We are faulted for recognizing that our holding may not always result in the most streamlined procedure. But the dissent does not comment on our concerns in footnote 21, above, that the opposite holding could also result in a waste of resources. We are not willing to sacrifice the correct result for an occasional gain in judicial economy.

4. The dissent ignores our citations to the Supreme Court, the Seventh Circuit, and two treatises by claiming that our "only rationale" is based on *Black's Law Dictionary*. We cite *Black's*, but our reasoning is also based on—among other sources—*Gulf Oil*'s statement that *forum non conveniens* in all cases "presupposes at least two forums in which the defendant is amenable to process," 330 U.S. at 507, 67 S.Ct. 839, and the Seventh Circuit's statement that *forum non conveniens* "by definition" contemplates that the forum deciding the motion "has both subject matter jurisdiction and personal jurisdiction over all parties," *In re Bridgestone/Firestone*, 420 F.3d at 704.

5. Our colleague acknowledges that the Seventh Circuit's *Kamel* case supports our result, but cannot distinguish it away. The dissent's only quibble with the case is apparently *Kamel*'s lack of citation or explanation, but that does not prevent us from joining the Seventh Circuit on this issue. The dissent also ignores the Seventh Circuit's reiteration of *Kamel*'s principles in its 2005 *In re Bridgestone/Firestone* case quoted above.

6. The dissent restricts *Gulf Oil* to holding "only that where the 'principle of *forum non conveniens* [applies] a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.'" (quoting *Gulf Oil*, 330 U.S. at 507, 67 S.Ct. 839) (alteration in original). This ignores the immediately preceding sentence in the *Gulf Oil* opinion, the one quoted above that *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process," *Gulf Oil*, 330 U.S. at 507, 67 S.Ct. 839; *see also id.* at 504, 67 S.Ct. 839 (noting that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue").

7. Our citation to the Ninth Circuit's *Patrickson* case is criticized as "inapposite." We agree that the Supreme Court did not explicitly discuss its affirmance of the Ninth Circuit's reversal of the *forum non conveniens* dismissal for a lack of subject matter jurisdiction. But as Nixon's attorney general John Mitchell said, in his oft-misquoted phrase, "You'd be better informed if instead of listening to what we say, you watch what we do." *The Oxford Dictionary of American Legal Quotations* 254 (Fred R. Shapiro ed., 1993). What the Court did speaks louder than its lack of discussion about it.

8. The dissent concedes that the Supreme Court stated that *forum non conveniens* "'can never apply'" without jurisdiction, but then claims that courts may abstain from exercising their jurisdiction without first checking to see if they have it. In other words, our colleague believes that a court can rule on *forum non conveniens*—which requires jurisdiction—just so long as it pretends that it has jurisdiction. But if a court suspects that it does not have personal jurisdiction over the parties, can it still dismiss for *forum non conveniens*? What if that court knows for certain that it does not have personal jurisdiction? We cannot tell how far the dissent's principle of willing blindness goes, but we decline to allow courts to exercise this legal fiction when ruling on a doctrine that depends by definition on the courts' having jurisdiction.

9. Last, the dissent claims that, while "it is important to determine whether the allegedly more convenient forum has jurisdiction to entertain the suit, there is no utility in, and no doctrinal necessity for, insisting that the present forum determine its own jurisdiction before dismissing." But this is certainly incorrect. The D.C. Circuit admitted as much in *Papandreou*. *Cf.* 139 F.3d at 256 n.6. It recognized that district courts without jurisdiction may not grant conditional dismissals on *forum non conveniens* grounds. Therefore, while district courts can "determine" whether the alternative forum has jurisdiction, they cannot make their decision stick under the dissent's reasoning. The usefulness of and necessity for our holding are that it grants district courts plenary power to deal with the consequences of their *forum non conveniens* dismissals. Not only can courts dismiss cases once their jurisdiction is established, but they can also enforce those dismissals and protect the non-moving parties in those cases.

In sum, we appreciate the dissent's arguments, but we remain unpersuaded and unchanged in our conviction that *forum non conveniens*, by its very terms, requires courts beforehand to ascertain and have subject matter jurisdiction and personal jurisdiction.[24]

* * * * * *

There is a difference between the typical "hypothetical jurisdiction" scenario contemplated in *Ruhrgas* and the situation we face. In *Ruhrgas*, the choice was basically between (a) dismissing based on personal jurisdiction and (b) reaching (and possibly finding) subject matter jurisdiction and then dismissing based on personal jurisdiction. *See Ruhrgas*, 526 U.S. at 588, 119 S.Ct. 1563. Here, the choice is between (a) dismissing for *forum non conveniens* or (b) reaching personal jurisdiction and either (i) dismissing based on the lack of it or (ii) finding personal jurisdiction and dismissing for *forum non conveniens*.

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[24] Proper venue, while not dealt with directly in this case, is of course also required, though, like personal jurisdiction, it too can be waived. 15 Wright, Miller & Cooper, *supra*, § 3828, at 287, § 3829, at 309.

Two characteristics make the two situations different. First, subject matter jurisdiction and personal jurisdiction are two of the prerequisites for litigation to proceed, but they are separate inquiries. Thus, it is no surprise that *Ruhrgas* leaves it up to the court to decide first whichever one it wants—there is no necessary order of decision. But *forum non conveniens* by definition requires two otherwise proper forums with both subject matter jurisdiction and personal jurisdiction. In this light, subject matter jurisdiction and personal jurisdiction are simply two of the horses to which the litigation cart is harnessed. Deciding *forum non conveniens* before jurisdiction puts the cart before the horses.

Second, a court following *Ruhrgas* can dismiss with the certainty that the case is not properly before it. Whether the case is deficient on subject matter jurisdiction or personal jurisdiction, the court cannot decide the merits. A case dismissed for *forum non conveniens*, on the other hand, is not faulty—by definition. It is a case properly before the court to determine the merits, although it is simply more convenient to do so elsewhere. But if a court were to dismiss a case for *forum non conveniens* without ascertaining jurisdiction (whether subject matter or personal), it could not enforce sending the case to the alternative forum. *Papandreou*, 139 F.3d at 256 n.6.

## IV. Conclusion

The District Court correctly determined that subject matter (here admiralty) jurisdiction exists because the injury resulting from Sinochem's alleged misrepresentations occurred on navigable waters and because the activity giving rise to MISC's claim had the requisite connection with maritime activity. But the Court should have ascertained all aspects of its jurisdiction—including personal jurisdiction—before engaging in a *forum non conveniens* analysis. We therefore vacate and remand this case to the District Court for a determination of whether personal jurisdiction exists.

STAPLETON, Circuit Judge, Dissenting.

In essence, this matter involves a claim that Sinochem committed fraud on the Chinese court in the course of

securing an arrest of the vessel, and the District Court did not abuse its discretion in determining that a balancing of the relevant private and public factors counseled abstention in favor of that court. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Accordingly, I would affirm the order of the District Court.

Our Court today mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate. That mandate subverts a primary purpose of the doctrine of *forum non conveniens*. That doctrine is intended to protect a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense. A doctrine having this objective should not be applied in a manner that imposes a substantial and unnecessary litigation burden on the defendant, absent some important countervailing consideration. The only countervailing consideration identified by Malaysia is the doctrine that courts without subject matter jurisdiction and personal jurisdiction over the defendant are powerless to adjudicate a case or controversy. While this is a valid and fundamental proposition, it does not dictate that the District Court conduct discovery and rule upon its personal jurisdiction over Sinochem before abstaining in favor of a far more appropriate forum.

A court may not assume that it has jurisdiction and then proceed to adjudicate the claim before it. The Supreme Court rejected such a "hypothetical jurisdiction" approach in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." The Supreme Court has made clear, however, that this principle is inapposite here:

> "[A] court that dismisses on . . . non-merits grounds . . . before finding subject-matter jurisdiction, [however] makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . *Steel*

> *Company.*" *In re Papandreou*, 139 F.3d 247, 255 (C.A.D.C.1998). It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, as the Court observed in *Steel Co.*, district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, see *Moor v. County of Alameda*, 411 U.S. 693, 715-716, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), or abstain under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), without deciding whether the parties present a case or controversy, *see Ellis v. Dyson*, 421 U.S. 426, 433-434, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975).

*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

My colleagues candidly acknowledge that the *forum non conveniens* doctrine presents "non merits issues" for the purpose of applying *Steel Co.* and *Ruhrgas*. They also concede that the result they reach "may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources." Op. at 35. Moreover, they are able to cite only one case—*Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir.1997)[25]—that arguably requires the result the Court here reaches.[26]

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[25] In *Kamel*, the District Court dismissed on grounds of *forum non conveniens* and the Court of Appeals agreed with that determination and affirmed. The Court of Appeals also found, however, that, while the complaint alleged complete diversity, there was a non-diverse party, and that the District Court, accordingly, had "lacked [subject matter] jurisdiction to rule on [the] *forum non conveniens* motion." 108 F.3d at 805. The Court held that it was authorized by Fed. R. Civ. Proc. 2, as construed in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), to dismiss the non-diverse dispensable party. It did not cite precedent for or explain either (a) its finding that the District Court was not authorized to rule on the *forum non conveniens* motion, or (b) its apparent conclusion that dismissal of the non-diverse party was a prerequisite to an affirmance.

[26] The other Supreme Court and Court of Appeals precedents relied upon by the Court are inapposite. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501,

The only rationale tendered for the Court's result is its assertion, based on *Black's Law Dictionary*, that "*forum non conveniens* is the voluntary transfer of a case from one legally competent court to another for reasons of convenience." From this generalization, the Court concludes that a "court cannot give away something it has no right to have in the first place." I am unpersuaded.

A court with jurisdiction normally has an obligation to exercise it. The *forum non conveniens* doctrine is an exception to this rule. That doctrine authorizes a court to decide not to exercise jurisdiction which it possesses, authority that by definition is unnecessary in the absence of jurisdiction. In this limited sense, it is true that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction." *Gulf Oil*, 330 U.S. at 504, 67 S.Ct. 839. It does not follow, however, that a court may not decide to abstain from exercising any jurisdiction it may have without

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(continued...)

507, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), holds only that where the "principle of *forum non conveniens* [applies] a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir.2001), *aff'd*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), was a case removed from state court in which the District Court determined that it had removal jurisdiction and thereafter dismissed on grounds of *forum non conveniens*. The Court of Appeals concluded that the District Court did not have removal jurisdiction and remanded with instructions that the case be sent back to state court. The Supreme Court agreed that the District Court was without jurisdiction, making no comment regarding the relief afforded by the Circuit Court judgment. No issue here relevant was argued before the Court of Appeals. While not discussed by the Court of Appeals, the issue presented by the case was whether in an improperly removed case the District Court or the state court should resolve a *forum non conveniens* issue. Given the comity considerations, it clearly should be the latter, a result that is, in any event, dictated by 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). As my colleagues concede, *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir.2005), is based on the faulty premise that *forum non conveniens* presents merits issues.

affirmatively determining the boundaries of its jurisdiction.[27] While, for obvious reasons, it is important to determine whether the allegedly more convenient forum has jurisdiction to entertain the suit, there is no utility in, and no doctrinal necessity for, insisting that the present forum determine its own jurisdiction before dismissing.

In short, a court "makes no assumption of law declaring power" when it decides not to exercise whatever jurisdiction it may have. *Ruhrgas*, 526 U.S. at 584, 119 S.Ct. 1563 (quoting *In re Papandreou*, 139 F.3d at 255). This means that a district court may dismiss on *forum non conveniens* grounds without first determining its own jurisdiction. *In re Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir.2002); *In re Papandreou*, 139 F.3d 247 (D.C.Cir.1998). I would affirm.

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[27] As the Court of Appeals for the District of Columbia explained in *In re Papandreou*, 139 F.3d 247, 255-56 (D.C.Cir.1998) (citations and footnote omitted):

> *Forum non conveniens* does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction. While such abstention may appear logically to rest on an assumption of jurisdiction, it is as merits-free as a finding of no jurisdiction. By the same principle on which the Court has approved a discretionary declination to exercise a pendent jurisdiction that may not have existed, it would be proper to dismiss on such grounds (if meritorious) without reaching the FSIA [jurisdictional] issue. Similarly, dismissal for want of personal jurisdiction is independent of the merits and does not require subject matter jurisdiction.

United States District Court, E.D. Pennsylvania.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION Berhad Menara Dayaburni, Jalan Hishamuddin 50712, Kuala Lumpur Malaysia
Plaintiff,

v.

SINOCHEM INTERNATIONAL CO. LTD. 18, 19 F, Jinmao Tower No. 88 Century Boulevard Pudong New Area Shanghai China
Defendant.

**No. Civ.A. 03-3771.**

April 13, 2004.

## MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

This Court entered an Order on March 1, 2004, dismissing this matter on grounds of *forum non conveniens*. Plaintiff Malaysia International Shipping Corporation (MISC) has filed the instant Motion for Reconsideration, pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 7.1(g), alleging that this Court erroneously weighed private and public factors inherent in a *forum non conveniens* analysis, thus committing manifest errors of law and fact. For the reasons stated below, we disagree, and will deny said motion.

### I. FACTUAL BACKGROUND

Our Order granting Defendant Sinochem International Co. Ltd.'s (Sinochem) Motion to Dismiss, filed March 1, 2004, sufficiently details the facts of this case. However, we will briefly outline the pertinent facts. Defendant entered into a contract with a U.S. company for the sale of steel coils, pursuant to which a valid bill of lading, showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The

purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law.

In Philadelphia, the steel coils were loaded on a vessel, of which Plaintiff MISC was the managing owner, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA) under U.S. law. The bill of lading also incorporated a charter party,[1] the terms of which currently are undisclosed, but which, according to evidence submitted previously, appear to implicate U.S. law.[2]

Upon arrival at the Chinese port in June 2003, Plaintiff's vessel carrying Defendant's cargo was arrested by order of the Guangzhou Admiralty Court, pursuant to a petition filed by Defendant for preservation of a maritime claim. This claim was based on an allegation that Plaintiff had fraudulently backdated the bill of lading (i.e., dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, Plaintiff paid the U.S. $9,000,000 security bond to obtain release of its vessel, and Defendant filed a complaint in Chinese Admiralty Court, on July 2, 2003.

The Chinese court has since rejected Plaintiff's jurisdictional objections to Defendant's Complaint, which

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[1] *Black's* defines charter party as a "contract by which a ship, or a principal part of it, is leased by the owner, especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the shipowner and charterer, especially for the carriage of goods at sea." *Black's Law Dictionary* (7th ed.1999).

[2] The appellate opinion from the Guangdong Provincial High Court reveals that the charter party calls for English law to be applied to any disputes, and for the parties to submit to arbitration in London. *See* Civil Ruling, Guangdong Provincial High Court of the People's Republic of China at 2, Pl.'s Reply Br. Ex. 1, Def.'s Response Br. Ex. 2. However, we will view this conflict with the evidence previously submitted to this Court in a light most favorable to Plaintiff and assume that the bill of lading calls for U.S. law.

Plaintiff appealed to China's court of appeal.[3] China's High Court, in a final judgment, affirmed the lower court's decision that this matter falls under Chinese jurisdiction.

On June 23, 2003, Plaintiff filed a Complaint in this Court, alleging that Defendant's accusation of fraud constituted "negligent misrepresentation [to the Chinese Admiralty Court] of [Plaintiff's] vessel's fitness and suitability to load its cargo." (*See* Am. Compl. ¶¶ 30, 34.) On March 1, 2004, this Court issued an Order granting Defendant's Motion to Dismiss and dismissing this matter for *forum non conveniens* without prejudice to Plaintiff's right to proceed in the appropriate Chinese court. Plaintiff now files the instant Motion for Reconsideration, claiming that we erred in our *forum non conveniens* analysis. We disagree. Plaintiff has failed to either identify a change in controlling law, introduce new evidence warranting reconsideration, or identify any manifest error of law of fact. Its disagreement with our weighing of the evidence does not satisfy the high standard for granting a Motion for Reconsideration.

## II. ANALYSIS

Motions for reconsideration under Federal Rule of Civil Procedure 59(e) are intended "to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). They are not available to provide unhappy parties an additional opportunity to sway the court, and "may not be used by litigants to 'rehash' the same arguments and facts previously presented to the court." *Stepanuk v. State Farm Mut. Auto. Ins. Co.*, No. 92-6095, 1993 WL 166748, at *2 (E.D.Pa. May 14, 1993).

As such, the applicable standard in this district is a rather stringent one, generally allowing a motion for reconsideration only on one of three grounds:

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[3] It bears noting that it appears that Plaintiff argued that, based on the terms of the bill of lading and charter party, the appropriate jurisdiction was not the United States, as it contends here, but rather London. *See* Civil Ruling at 2.

> (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice.

*Klee v. Lehigh Valley Hospital*, No. 97-4642, 1998 WL 966011, at *1 (E.D.Pa. Nov.30, 1998), *aff'd*, 203 F.3d 817 (3d Cir.1999). Plaintiff has neither alleged a change in controlling law nor the existence of new evidence. Thus, its motion can survive only if it can demonstrate a clear legal error or a manifest injustice by this Court in our previous order granting Defendant's Motion to Dismiss.

Plaintiff appears to raise three grounds for reconsideration regarding our analysis of *forum non conveniens*: (1) our analysis of public and private interest factors inadequately considered "all of the American witnesses and the import of their testimony"; (2) we erred in our determination of the most convenient forum; and (3) we failed to sufficiently consider American interests. (Pl.'s Br. at 2.) Having neglected to follow its own statement that it be "mindful of the need to . . . not merely [ ] reargue matters dealt with previously," Plaintiff has failed to establish any of these grounds. *See id.*

First, Plaintiff argues that we inadequately weighed private interest factors because "the witnesses in the U.S. far outnumber the Sinochem representatives in the Chinese Admiralty Court," *id.*, and that, despite the fact that China has retained jurisdiction, we should weigh the existence of a parallel suit in Chinese court in favor of Plaintiff. As we found in our prior opinion, the private interest factors that Plaintiff claims compel us to maintain jurisdiction (ease of access to sources of proof and the availability of compulsory process for unwilling witnesses) do not weigh in favor of trying this matter here.

Preliminarily, with respect to access to witnesses, while Plaintiff provides additional detail in the instant motion of the identities and backgrounds of the witnesses it anticipates calling at trial, we cannot credit that information as grounds

for reconsideration because it was available at the time Plaintiff responded to the Motion to Dismiss. It is well established that "[w]here evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration." *Harsco*, 779 F.2d at 909; *see also e.g. Delong Corp. v. Raymond Int'l Inc.*, 622 F.2d 1135, 1140, *overruled on other grounds by Croker v. Boeing Co. (Vertol Division)*, 662 F.2d 975 (3d Cir.1981) (stating that evidence presented in a motion for reargument was available, and thus should have been advanced, at the time the motion for summary judgment was argued).

Plaintiff's response to Defendant's Motion to Dismiss provided only a vague conclusory statement identifying witnesses, which did not explicitly establish their connection to the United States. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss at 23 ("Witnesses include the Novolog employees, surveyors retained on behalf of the various vessel interests and shipper, the local agent, and so forth. None of these witnesses is located in China. Since the loading took place in Philadelphia, the majority of the witnesses to the loading will be in Pennsylvania.")) Our original opinion considered this statement, noted that, with the exception of the Novolog employees, Plaintiff did not establish any witness' connection to the United States, and determined that consideration of "relative ease of access to sources of proof" did not weigh in favor of trying the matter in the United States. *See Memorandum Opinion* at 18-19; *see also Lacey v. Cessna Aircraft Co.*, 930 F.2d 170, 180 (3d Cir.1991) (identifying the private interest factors to consider in a *forum non conveniens* analysis).

We are prohibited now from considering Plaintiff's additional evidence regarding the identities and connections of the surveyors, as such information was available at the time we considered Defendant's Motion to Dismiss. Furthermore, even if Plaintiff had supplied that additional information at the appropriate time, it would not have been sufficiently compelling to warrant trying this matter here. The multitude of other factors identified in our prior opinion

favoring the Chinese forum would have outweighed this evidence.

Furthermore, contrary to Plaintiff's argument, "the availability of compulsory process for attendance of unwilling witnesses" does not weigh in favor of the United States, as it appears that both forums are equally competent to address unwilling witnesses. While Plaintiff argues that the Chinese court cannot compel attendance of non-party witnesses, it also recognizes that this Court cannot compel witnesses outside of one hundred miles of the Eastern District of Pennsylvania. (Pl.'s Br. at 5); *see also* Fed.R.Civ.P. 45 (discussing the subpoena power of federal courts). Thus, both forums may face some difficulty compelling the appearance of witnesses.

However, China does allow witnesses in distant locations to testify through audio or video technology, as well as admits evidence obtained pursuant to our discovery process. (*See* Decl. of Lu Min on Reconsideration, ¶¶ 7-8 (identifying the specific rules under Chinese law providing for these mechanisms)); *e.g.*, *Sinochem Int'l Co. Ltd. v. Triorient Trading Inc.*, No. 2:03-mc-87-FVA (E.D.Pa. May 20, 2003) (allowing subpoenas to be issued against Pennsylvania companies in furtherance of litigation in a Chinese court). Thus, because both courts would need to use applicable mechanisms for compelling testimony from foreign witnesses, and China has adequate means of addressing this problem, this factor does not weigh in favor of trying this matter in the United States.

Plaintiff's arguments simply cannot outweigh, in addition to the other factors set forth in our prior opinion, the overwhelming evidence of a duplicate matter being litigated in a Chinese court which, with respect to critical private interest factors like cost and time to the parties and witnesses, makes it utterly impractical to proceed in this Court. On February 27, 2004, the Guangdong Higher People's Court in China dismissed Plaintiff's appeal of the Guangzhou Admiralty Court's decision and retained jurisdiction of the case. (Civil Ruling at 2 ("Under Articles

19 of the *Special Maritime Procedural Law of the People's Republic of China*, and Article 243 of the *Code of Civil Procedure of the People's Republic of China*, the Guangzhou Admiralty Court has jurisdiction over this case.")).

Apparently, Plaintiff cannot raise further appeals and the matter is expected to proceed in the Guangzhou court on April 12, 2004. (Decl. of Lu Min, ¶ 5.) We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782.[4]

Furthermore, while we certainly agree with Plaintiff that we are a court of an independent, separate sovereign from China, and thus may act independently in determining this matter, we do not understand how this fact supports Plaintiff's argument that we should hear the instant case. Our ruling, at which we arrived wholly independent of that of the Chinese court, is not based on the Chinese court's legal analysis of jurisdiction. Rather, the import of the Chinese matter rests simply in the fact that it exists and is proceeding. As required in any analysis of *forum non conveniens*, we must consider the lack of convenience and heightened burden to the parties of litigating parallel proceedings. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 241, 241 n.6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (discussing the *forum non conveniens* analysis and the public and private

[4] We disagree with Plaintiff's characterization of these parallel proceedings as distinct matters because "while these actions have some similar interrelated facts, the parties seek different remedies." (Pl.'s Reply Br. at 4.) Both proceedings arise out of the exact set of facts and focus on the same issue. We further note that Plaintiff argued before the Chinese High Court that these matters were, in fact, identical. (*See* Civil Ruling at 2, Pl.'s Reply Br. Ex. 1 ("The appellee filed the action to Guangzhou Maritime Court in July 2003, which is later in time when (sic) appellant filed the action in the Unite (sic) States. Hence, Guangzhou Maritime Court should not entertain the action brought by the appellee against the appellant for the *same dispute*.") (emphasis added)).

interest factors inherent in such an analysis, all of which focus on the convenience to the parties and to the forum).

The overwhelming significance of ensuring the convenience of all parties, by requiring that they participate in litigation of a specific matter in only one forum, tips the scale heavily toward a finding that, despite the deference we pay to Plaintiff's preferred forum, China presents the most convenient and appropriate forum to hear this matter. To find otherwise would "establish ... oppressiveness and vexation" not only to Defendant, but to all parties involved. *Id.* at 241.

Finally, we did not err in our consideration of American interests. While we underscore that motions for reconsideration do not allow for the rehashing of arguments, and thus we need not reconsider Plaintiff's argument that the choice of law provision in the bill of lading mandates that the case be tried here, we will reiterate our finding from our first judgment that the terms of the bill of lading are not implicated here.[5] In our original opinion, we stated, and Plaintiff does not dispute, that "Plaintiff does not allege a violation with respect to the nature of the carrier's duties to be carried out pursuant to the bill of lading and carriage contract, such as the manner of loading, conditions in transit, or protection of the cargo." *Memorandum Opinion* at 21. Consequently, the provisions of the bill of lading do not come into play.

Moreover, this finding is entirely consistent with Plaintiff's argument that "[u]nder COGSA, the carrier is required to properly and carefully load the goods carried. 46 U.S.C. § 1303(2). In addition, after receiving the goods into his charge, the carrier is required to issue 'a bill of lading showing *among other things*—. . . (c) The apparent order and

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[5] We note that the High Court in China agrees with us, stating that "[s]ince the [Plaintiff] has initially instituted its proceeding on the ground of the joint tort feasance of the two co-defendants, the jurisdiction involved in this case shall not be bound by the arbitration clauses of the Bill of Lading or the maritime cargo shipping contract." (Civil Ruling at 3; Def.'s Br. Ex. 2.)

condition of the goods,'" and that this duty implicitly requires "that the bill of lading accurately reflect[ ] the load." (Pl.'s Br. at 9 (internal citations excluded) (emphasis in original)). Indeed, if Plaintiff was alleging a defect in the "order and condition of the goods," the manner in which the goods were loaded or shipped, or the description of the load in the bill of lading, we likely would find its argument compelling that the terms of the bill of lading, including the choice of law provision, were implicated. However, we reiterate that Plaintiff does not make such an allegation; its sole complaint alleges a tortious action, not a contractual violation, and involves Defendant's allegation that it wrote the wrong date on the bill.

The cargo-loss case cited by Plaintiff in support of its position, *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir.1985), further highlights this distinction. There, the Second Circuit applied the choice of law provision called for in the bill of lading where, after having neglected to load all of the cargo supplied by the seller, the carrier erred when it described the full load of goods in the bill of lading. The Second Circuit ruled that the carrier was responsible for the value of the lost cargo because it falsely stated in its bill of lading that it had loaded one hundred bundles of tin ingots, even though it had loaded only seventy bundles. *Id.* at 847-48. As this matter involved conduct by the carrier that adversely affected the cargo, the court appropriately applied the choice of law provision set forth in the bill of lading. Comparatively, here, Plaintiff has raised no such allegation of damage or loss to the cargo.

It is clear that the import of a bill of lading lies in its focus on the conditions and treatment of cargo shipped by a carrier. *Black's* defines a "bill of lading" as "[a] document of title acknowledging the receipt of goods by a carrier. . . ." *Black's Law Dictionary* (7th ed.1999). It further recognizes a bill of lading to have three specific functions, all of which pertain directly to the cargo: (1) serve as a receipt that the specific goods identified in the bill have been loaded on board; (2) document "'the terms of the contract for the carriage of the goods'"; and (3) serve as the document of title, allowing the

owner of the goods to continue to deal with them while they are on board the ship and at sea. *Id.* (quoting William R. Anson, *Principles of the Law of Contract* 380 (Arthur L. Corbin ed., 3d Am. ed.1919)); *see also Brisford Metals*, 779 F.2d at 845 (citing the same three purposes of a bill of lading).

Similarly, the Second Circuit's lengthy discussion in *Berisford Metals* of the import of the bill of lading mentions several cases, all of which involve errors in the bill of lading with respect to the conditions of the cargo or the carrier's actions regarding whether and how it loaded the cargo; all involve some sort of loss or damage to the cargo. *See Brisford Metals*, 779 F.2d at 845-847 (citing *e.g.*, *Higgins v. Anglo-Algerian Steamship Co.*, 248 F. 386 (2d Cir.1918), involving a bill of lading that falsely represented the adequate condition of known damaged goods, and *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir.1928), involving a bill of lading that falsely represented that lost cargo had been loaded in a specific location when the goods had in fact never been loaded).

To beat the proverbial dead horse, it is undisputed that there is no allegation of damage or misconduct with respect to the cargo; rather, the conflict focuses on the date the carrier issued the bill of lading. As such, the function and purpose of the bill of lading are not called into question. Consequently, its choice of law provision is not relevant here.

Plaintiff further avers that our finding "suggests to all that bills of lading for foreign trade shipped out of the United States can be fraudulently created with no consequence." (Pl.'s Br. at 9.) Our *forum non conveniens* analysis finds only that the Chinese admiralty court is the best forum for this matter involving alleged negligent misrepresentations made by a Chinese corporation to a Chinese court. We are confident both that the Chinese court shares our appreciation of the significance of properly-issued bills of lading to

international maritime commerce, and that it is competent to address this underlying allegation.[6]

As Plaintiff points out, a court may dismiss a case when "an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to a plaintiff's convenience,'. . . ." *Piper*, 454 U.S. at 241. It is clear that China presents an adequate alternative forum, and we cannot imagine how a duplicate case, which not only would be inconvenient to the parties but onerous to their witnesses, and which implicates no significant American interests, does not create a substantial enough burden for everyone involved to warrant dismissal in this Court.

## III. CONCLUSION

Plaintiff filed the instant Motion for Reconsideration, pursuant to Fed.R.Civ.P. 59(e) and Local Rule 7.1(g), on grounds that we erred in our previous *forum non conveniens* analysis, incorrectly weighing private and public interest factors, and failing to properly consider what it characterized as significant American interests. We find that much of Plaintiff's arguments merely rehashed contentions made earlier in response to Defendant's Motion to Dismiss, and that Plaintiff's disagreement with our analysis does not warrant reconsideration. After careful reconsideration of the issues, we reiterate that China is the best forum to hear this negligence matter between two foreign companies. Thus, we deny the motion. An appropriate order follows.

## ORDER

AND NOW, this 13th day of April, 2004, upon full consideration of Plaintiff's Motion for Reconsideration, filed March 15, 2004, Defendant's response thereto, filed March 31, 2004, and Plaintiff's Reply Brief, filed April 7, 2004, it is hereby ORDERED that Plaintiff's Motion is DENIED.

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[6] While not raised previously, we recognize Plaintiff's argument that we should consider the possible joinder of Pan Ocean only to note that we cannot base our findings on mere speculation.

United States District Court, E.D. Pennsylvania.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION BERHAD Menara Dayaburni, Jalan Hishamuddin 50712, Kuala Lumpur Malaysia
Plaintiff,

v.

SINOCHEM INTERNATIONAL CO. LTD. 18, 19 F, Jinmao Tower No. 88 Century Boulevard Pudong New Area Shanghai China
Defendant.

**No. Civ.A. 03-3771.**

Feb. 27, 2004.

## MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

Plaintiff Malaysia International Shipping Corporation (MISC) has brought suit claiming that Defendant Sinochem International Co. Ltd. (Sinochem) made negligent misrepresentations to a Chinese Admiralty Court. Sinochem moves to dismiss MISC's Amended Complaint for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and for lack of personal jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(2) and (b)(5). Additionally, Defendant argues that dismissal of the Amended Complaint is warranted for *forum non conveniens* and Plaintiff's failure to observe the rules of comity. For the reasons stated below, we will grant said motion.

### I. FACTUAL BACKGROUND

This matter involves the arrest of a Malaysian vessel in China by order of a Chinese Admiralty Court, pursuant to the petition of a Chinese corporation, which alleges that the Malaysian vessel owner fraudulently back-dated the bill of lading when it loaded the Chinese corporation's cargo. This matter's undisputed connection to the district of this Court is

that the cargo was loaded by an American company, a non-party to this suit, at the Port of Philadelphia in 2003.

The undisputed facts are as follows. Defendant Sinochem, a Chinese company, contracted with Triorent Trading, Inc. (Triorient), an American company located in Connecticut, to purchase a substantial quantity of steel coils. The contract called for the coils to be shipped from the United States to China on or before April 30, 2003, and that, before Triorient could receive payment, *inter alia*, a corresponding valid bill of lading needed to be tendered to the bank where Defendant had opened a line of credit for the purchase of the steel coils. (Pl.'s Br. at 3.) The contract further expressly called for any disputes arising out of the contract to be arbitrated under Chinese law. (Contract, Def.'s Br. Ex. 3 at 3.)

Triorient sub-chartered the vessel on which the coils were shipped from Plaintiff MISC, a Malaysian company and the managing owner of the vessel (Pl.'s Br. at 2), and hired Novolog Bucks County, Inc. (Novolog), a stevedoring company located in Pennsylvania, to load the steel coils onto Plaintiff's vessel at the Port of Philadelphia. A bill of lading was issued, acknowledging receipt of the cargo, and the vessel set sail for China. (Pl.'s Br. at 3.) The bill of lading was dated April 30, 2003, and lists Triorient as the shipper and Pan Ocean Shipping Co., Ltd. (Pan Ocean) as the carrier. Defendant was identified as the party to notify, signifying that it is the end receiver; Plaintiff is not mentioned on the bill. The contract of carriage accompanying the bill of lading calls for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA) under U.S. law. The bill of lading also incorporates a charter party,[1] the terms of which Pan Ocean will not disclose; however, its counsel states in a letter that the charter party implicates U.S. law.

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[1] *Black's* defines charter party as a "contract by which a ship, or a principal part of it, is leased by the owner, especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the shipowner and charterer, especially for the carriage of goods at sea." *Black's Law Dictionary* (7th ed. 1999).

Upon arrival at the Chinese port in June 2003, Plaintiff's vessel carrying Defendant's cargo was arrested by order of the Guangzhou Admiralty Court, pursuant to a petition filed by Defendant for preservation of a maritime claim. This claim was based on an allegation that Plaintiff had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). According to Defendant, this alleged fraud infringed its rights and caused significant financial loss. (Civil Decision, Pl.'s Br. Ex. C and Def.'s Br. Ex. 2.) As required by the ruling, Plaintiff paid the ordered US $9,000,000 security bond to obtain release of its vessel and Defendant filed a complaint in Chinese Admiralty Court. (*See* Civil Decision; Def.'s Br. at 2.)

The matter involving Defendant's Complaint, filed on July 2, 2003, that Plaintiff fraudulently backdated the bill of lading, is currently proceeding before a judge in the Chinese Admiralty Court. Plaintiff has contested the jurisdiction of the Chinese court on grounds either that the charter party incorporated in the bill of lading calls for the application of U.S. law or that the commencement of the instant action before this Court, on June 23, 2003, obviates the need for the Chinese court to entertain the matter. (*See* Huang Ya Quan Affirmation and Statement of Appeal, Pl.'s Br. Ex. A.) Rejecting this jurisdictional objection, the Guangzhou court dismissed Plaintiff's application. Plaintiff has since appealed the ruling to the Guangdong Provincial High Court, China's court of appeal. The High Court's decision remains pending. (Huang Ya Quan Affirmation, Pl.'s Br. Ex. A ¶ 9.)

The Complaint filed in this Court stems from the same incident and runs parallel to the matter before the Chinese Admiralty Court; both matters turn on whether Plaintiff fraudulently back-dated the bill of lading. Denying these allegations of fraud, Plaintiff in the instant matter claims damages resulting from Defendant's alleged "negligent misrepresentation [to the Chinese Admiralty Court] of [Plaintiff's] vessel's fitness and suitability to load its cargo," which resulted in substantial financial losses due to the

Chinese court's arrest of the vessel. (*See* Am. Compl. ¶¶ 30, 34.)

Defendant has filed the instant Motion to Dismiss for lack of subject matter and personal jurisdiction. If we find that we have jurisdiction over this matter, Defendant further contends that we should decline to entertain this claim on grounds of *forum non conveniens* and Plaintiff's failure to observe the rules of international comity by engaging in forum-shopping.

We find that we do have subject matter jurisdiction, as this is a matter or admiralty or maritime jurisdiction. We further find that, while Plaintiff cannot establish personal jurisdiction over Defendant through Pennsylvania's long-arm statute, limited jurisdictional discovery could establish personal jurisdiction through the federal long-arm statute. However, the taking of such discovery will not be necessary because we find that the Chinese Admiralty Court is the best venue and authority to address this matter and we thus grant the Motion to Dismiss for *forum non conveniens*.

## II. ANALYSIS

### A. *Subject Matter Jurisdiction*

Defendant objects to this Court having subject matter jurisdiction over this case and argues the absence of such jurisdiction on three bases: (1) maritime jurisdiction; (2) diversity; and (3) federal question through the Carriage of Goods by Sea (COGSA) or Harter Acts. Because we conclude that this matter falls within federal maritime jurisdiction, we find that we do have subject matter jurisdiction, and deny Defendant's motion as to this argument.

Plaintiff asserts that this case is one of admiralty or maritime jurisdiction, giving us original subject matter jurisdiction, pursuant to 28 U.S.C. § 1333. We agree. For a plaintiff to establish jurisdiction under § 1333, it must satisfy a two-prong test, establishing both a location and a connection to maritime activity.

With respect to location, Plaintiff must show either that "the tort occurred on navigable water or [that the] injury suffered on land was caused by a vessel on navigable water." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 179 (3d Cir.1995).

Plaintiff easily establishes this first prong of the test, as the Third Circuit's finding in *Neely* so instructs. There, the plaintiff filed suit in the Eastern District of Pennsylvania, claiming violations of maritime law, after being injured by the propellers of a scuba diving vessel that was anchored in the coastal waters of St. Lucia. *Neely*, 63 F.3d at 170. Concluding that the district court had subject matter jurisdiction, the Third Circuit found that "the locality test is readily satisfied, for plaintiff's injuries occurred in navigable waters and were caused there by a vessel." *Id.* at 179.

Contrary to some district court holdings in the Second and Fourth Circuits, which Defendant cites in an effort to narrow the scope of the locality test, *Neely* demonstrates that the Third Circuit does not invoke an additional element requiring that the "navigable water" be under the jurisdiction of the United States.[2] Thus, the fact that the vessel was seized in China is of no consequence. As the seizure occurred on navigable water, at a port in China, Plaintiff's Complaint satisfies the locality prong.

Further, to establish the requisite connection to maritime activity, Plaintiff must show both that the general features of the alleged negligence "had 'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Grubart*, 513 U.S. at 534 (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 n.2,

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[2] To state the obvious, St. Lucia is not part of the United States, but rather its own commonwealth, having received its independence from Great Britain in 1979. *See* http://www.stlucia.gov.lc/saint_lucia/saintluciaconstitution/the_saint_lucia_constitution.htm

365, 364, and n.2, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990)). This matter satisfies both of these elements.

While neither party characterizes the general features of this matter, we note that throughout their briefs, Plaintiff focuses on the loading of the cargo in Philadelphia and the alleged fraudulent bill of lading as the critical incident, while Defendant emphasizes the arrest of the vessel in the Chinese port. For these purposes, we need not establish which incident is the relevant activity because the general features of both activities have a sufficient connection with maritime activity. We look to the Supreme Court for guidance in describing the general character of these incidents.

In *Sisson*, which involved damages to a marina on Lake Michigan, as well as vessels docked nearby, resulting from a fire that ignited on a pleasure yacht docked there, the Supreme Court characterized the incident for jurisdictional purposes as "a fire on a vessel docked at a marina on navigable waters." 497 U.S. at 363. Following this lead, we characterize this incident either as the improper loading of cargo on a vessel docked at a port on navigable waters or the arrest of a vessel docked in navigable waters. Both scenarios have a potentially disruptive impact on maritime commerce.

The possible effects on maritime commerce of untimely, or otherwise improper, loading of cargo are obvious and far-reaching. Similarly, it is clear that the seizure of a vessel has the potential to disrupt commercial activity, as such an arrest hinders the ability of the vessel to carry out further commercial transactions. *See Neely*, 63 F.3d at 179 (finding a potential disruptive impact on maritime commerce in part because the incident "could lead to delays in commercial shipping").

Furthermore, both the arrest of a vessel and the improper loading of a vessel at a dock on navigable waters have clear and substantial relationships to maritime activity. Based on its desire to protect maritime commerce, which is the fundamental purpose underlying maritime jurisdiction, the Supreme Court has stated that all "activities traditionally undertaken by vessels, commercial or noncommercial," have

a substantial relationship to maritime activity. *Id.* at 367 (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982)). As such, the Court in *Sisson* found that docking a ship was an important maritime activity because, at a marina, vessels often remained for long periods of time and received fuel supplies. Accordingly, the storage and maintenance of a ship at a marina had a substantial relationship to maritime activity. *Id.* Similarly, loading a ship, which is done while the ship is docked at a marina and which involves actions very similar to obtaining supplies, is substantially related to maritime activity.

Furthermore, if activities undertaken by vessels have a substantial relationship to maritime activity, it logically follows that actions carried out *to or against* vessels would also have a substantial relationship to maritime activity. As such, the very serious act of arresting a vessel at a port sufficiently relates to maritime activity to establish subject matter jurisdiction.

Because this matter occurred on navigable water and has a sufficient connection to maritime activity, we find that it falls within the scope of admiralty or maritime jurisdiction. As such, we appropriately have subject matter jurisdiction over this claim.[3]

**B. *Personal Jurisdiction***

Defendant next argues that we should dismiss this Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(2), for lack of personal jurisdiction. In furtherance of this argument, Defendant contends that this Court lacks specific jurisdiction because Defendant has no place of business in Pennsylvania and has not availed itself of the privileges of Pennsylvania commerce.

As Defendant has contested personal jurisdiction, the burden lies with Plaintiff to demonstrate "with reasonable

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[3] As we find that this admiralty matter falls within this Court's subject matter jurisdiction, we need not address Defendant's objections with respect to diversity or federal question subject matter jurisdiction.

particularity" the sufficiency of the non-resident Defendant's activities in Pennsylvania. *Provident Nat'l Bank v. Cal. Fed. Savings & Loan Assoc.*, 819 F.2d 434, 437 (3d Cir.1987). We find that Plaintiff has not identified sufficient minimum contacts to establish personal jurisdiction, either specific or general, based on the Pennsylvania long-arm statute.[4] However, we do find that, with limited jurisdictional discovery, Plaintiff might be able to establish jurisdiction pursuant to the federal long-arm statute, under Fed.R.Civ.P. 4(k)(2).

1. *Pennsylvania Long-Arm Statute, Pursuant to Fed.R.Civ.P. 4(e)*

Under Fed.R.Civ.P. 4(e), a federal district court has personal jurisdiction over a non-resident defendant if a state court would have that power. *Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F.2d 208 (3d Cir.1984). Accordingly, we look to the Pennsylvania long-arm statute, 42 Pa. Cons. Stat. Ann. §§ 5301 *et seq.* (Purdon 1981 & Supp. 1989), to determine whether facts or circumstances exist to require Defendant to answer in this forum. Section 5322(b) of the long-arm statute authorizes both general and specific jurisdiction to the "fullest extent allowed under the Constitution of the United States." Thus, because Pennsylvania's "reach is coextensive with the limits placed on states by the federal constitution," *Vetrotex Certaineed Corp. v. Consolidated Fiber Glass Products Co.*, 75 F.3d 147, 150 (3d Cir.1996), we apply the familiar two-part test summarized below.

The interpretation of the United States Constitution by Pennsylvania courts does not, however, bind federal courts. Instead, we must look to federal constitutional doctrine in assessing Defendant's susceptibility to personal jurisdiction in Pennsylvania. The Fourteenth Amendment due process

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[4] The analysis that follows a [sic] pertains solely to specific jurisdiction. Plaintiff does not contest Defendant's argument that it does not have the continuous and systematic contacts to establish general jurisdiction, and we think that Defendant's clear showing of an absence of general jurisdiction obviates the need for any such discussion.

clause limits the power of the state to assert personal jurisdiction over a nonresident defendant. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1877). The basic factors for ascertaining whether the exercise of personal jurisdiction over a nonresident defendant is proper were set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). That case held that due process is satisfied when a nonresident defendant has such minimum contacts with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (internal citation omitted).

The Third Circuit Court of Appeals has cogently summarized the applicable two-part inquiry:

> First, the defendant must have made constitutionally sufficient 'minimum contacts' with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). The determination of whether minimum contacts exist requires an examination of the 'relationship among the forum, the defendant and the litigation.' *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977), in order to determine whether the defendant has 'purposefully directed' its activities towards residents of the forum. *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984)). There must be 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Second, if 'minimum contacts' are shown, jurisdiction may be exercised where the court determines, in its discretion, that to do so would comport with 'traditional notions of fair play and substantial justice.' *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

*Vetrotex*, 75 F.3d at 150-151. "Specific jurisdiction" is invoked when the cause of action arises from, or is related to, the defendant's contacts with the forum, such that the defendant "should reasonably anticipate being haled into court there." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 n.8, 415, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

We find that Plaintiff has failed to establish sufficient minimum contacts. As the primary contact to Pennsylvania, Plaintiff argues that Defendant availed itself of the benefits of this jurisdiction when it applied for an order from this Court allowing it to take discovery for the purposes of foreign litigation in a related matter.[5] (*See* Pl.'s Br. at 15.) However, we agree with Defendant that this independent action does not give rise to personal jurisdiction, as the prior order involved a separate matter not being litigated in this country, much less this jurisdiction, and a different party.

While Plaintiff correctly quoted Third Circuit precedent that parties seeking affirmative relief in a particular court typically subject themselves to that jurisdiction for litigating matters arising from the same subject matter, *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir.1999), *Bel-Ray* and the other cases cited both in *Bel-Ray* and by Plaintiff are clearly distinguishable because they involve proceedings between the same parties all within the same suit.

For example, the *Bel-Ray* court denied the defendants' personal jurisdiction defense because, prior to asserting that defense, the defendants had moved for, and litigated, summary judgment on a counterclaim. Those actions, made within the same case and involving the same party against whose claims they attempted to assert the personal

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[5] While it seems to have arisen from the same subject matter as the instant claim, this matter, 2:03-mc-00087-FVA, involved a foreign action by Defendant against an entity not a party to this case, for which Defendant needed records from two Pennsylvania companies, neither of which are parties to the instant suit.

jurisdiction defense, effectively constituted a waiver of that defense. *Id.* at 443-44.

In so finding, the *Bel-Ray* court relied on earlier Third Circuit case law that "held that a defendant who participates in the adjudication of the plaintiff's application for a preliminary injunction without securing a determination of his challenge to the court's personal jurisdiction over him submits himself to the jurisdiction of the court. . . ." *Id.* (discussing *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 547 (3d Cir.1967)). Again, just as in *Bel-Ray*, *Wyrough* involved proceedings within the same case arising from the same subject matter involving the same parties.

Similarly, the Supreme Court in *Adam v. Saenger*, which Plaintiff also cites, found that a procedure allowing judgment against the plaintiff, against whom the defendant had filed a cross-claim, does not violate the due process clause because "the plaintiff, having, by his voluntary act [of filing a claim,] in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed. 649 (1938).

Unlike the aforementioned cases, not only did the prior matter involving Defendant before this Court not involve Plaintiff or this negligence claim, but it did not even involve a claim seeking relief from another party. *See Wyrough*, 376 F.2d at 547 (reasoning that because the hearing would resolve factual conflicts and could grant some relief, the party's participation in that proceeding waived the personal jurisdiction defense as to the specific litigation in that case). Rather, Defendant merely filed an application to take discovery from two companies based in Pennsylvania, who are not parties to this suit, in furtherance of foreign litigation against another non-party to this suit. In fact, Defendant filed the application for the Order permitting discovery on May 15, 2003, almost one month prior to Plaintiff's vessel even arriving in China.

The application and corresponding order for discovery involving parties *not* part of the instant suit in furtherance of a matter *not* being litigated in this country simply does not rise to the level of establishing a contact with Pennsylvania such that Sinochem would expect to be haled into court here on a completely different claim.

Finally, to find Defendant's prior discovery application and this Court's order relevant to a determination of personal jurisdiction in this case would be inconsistent with other findings in this circuit. *See, e.g., Paul Yanuzzi Builders, LLC v. Music Mountain Assocs., L L C*, No. 02-cv-7438, 2003 WL 925368, at *2 (E.D.Pa. Feb. 28, 2003) (finding that the defendants did not submit to personal jurisdiction by requesting discovery prior to raising the defense). We find that Defendant did not establish a minimum contact with Pennsylvania for purposes of this case by seeking an order to take discovery in a separate matter.

As such, the sole remaining alleged minimum contact to this jurisdiction is the fact that the cargo at issue was loaded onto the vessel in Philadelphia.[6] (*See* Pl.'s Br. at 16-17 (identifying Defendant's minimum contacts alleged to be substantial enough not to violate the Due Process Clause)). However, this contact alone does not survive a due process analysis, such that Defendant would reasonably expect to be haled into court here. As such, Plaintiff has not demonstrated that this Court has specific jurisdiction over Defendant through Pennsylvania's long-arm statute.

2. *Federal Long-Arm Statute, Pursuant to Fed.R.Civ.P. 4(k)(2)*

We do find, however, that provided limited discovery, Plaintiff might be able to identify sufficient national contacts to establish personal jurisdiction over Defendant through the federal long-arm statute. However, because we grant

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[6] Additionally, Plaintiff argues that Defendant's purchase of the cargo from Pennsylvania was a further minimum contact. However, Plaintiff's own pleadings indicate that Defendant contracted with Triorient Trading, Inc., a Connecticut corporation, to purchase the steel coils. (*See* Pl.'s Br. at 18.)

Defendant's Motion to Dismiss on other grounds, we will not order such discovery.

Under Rule 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis.[7]

While the Third Circuit has not ruled on whether Rule 4(k)(2) applies to matters of maritime jurisdiction, in a case of first impression for this Circuit, the District of the Virgin Islands relied on "its own reading of the rule, and the similar reasoning used in the currently unanimous body of case law on point," to hold Rule 4(k)(2) applicable to cases of admiralty and maritime law. *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F.Supp. 1232, 1235 (D.Vi.1997) (citing the only other opinions at the time to address this issue, all but one of which found that Rule 4(k)(2) encompasses maritime cases). The sole opinion to find to the contrary was reversed by the Fifth Circuit, which held that federal law does include maritime cases, as applied to Rule 4(k)(2). *World Tanker Carriers Corp. v. My Ya Mawlaya*, 99 F.3d 717, 722-723 (5th Cir.1996) (discussing the federal nature of maritime law and citing numerous cases that have stated that admiralty cases are federal law). Since *Western Equities*, no case in our Circuit has held otherwise. Thus, we follow our sister court and find that the federal long-arm statute does apply to admiralty cases.

With respect to the second element of the test, Defendant's own arguments, coupled with the absence of argument regarding personal jurisdiction from Plaintiff,

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[7] The rule states

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state. Fed.R.Civ.P. 4(k)(2).

make clear that it does not have general jurisdiction in Pennsylvania. *See* Def.'s Br. at 14-16 (arguing absence of personal jurisdiction). However, it is unclear whether any other state may have general jurisdiction over Defendant. Despite Defendant's averment that it "is incorporated and has its principal place of business in China" (Dacheng Decl. ¶ 8), it is uncertain whether Defendant has "continuous and systematic contacts" with any forum in the United States, from which general jurisdiction would arise. *General Elec. Co. v. Deutz Ag*, 270 F.3d 144, 150 (3d Cir.2001) (citing *Helicopteros*, 466 U.S. at 414-16); Def.'s Br. at 14. We would allow minimal jurisdictional discovery to make this determination.

Similarly, it is uncertain whether Defendant has sufficient minimum contacts with the United States to survive a due process analysis. The "widely adopted" test applied by the court in *Western Equities* to determine whether the defendant had enough minimum contacts considered three factors with respect to the defendant:

> (1) transacting business in the United States; or
> (2) doing an act in the United States; or
> (3) having an effect in the United States by an act done elsewhere.

*Western Equities*, 956 F.Supp. at 1237.

Defendant avers that its personnel work in China, that it has no place of business in the United States, and that it neither advertises nor solicits business in the United States. (Dacheng Decl. ¶¶ 8-9.) However, Plaintiff claims that Defendant does have "enterprises in the United States which may be related for purposes of jurisdiction" (Pl.'s Br. at 20), and we are required to interpret all factual disputes in a light most favorable to the plaintiff. *Toys "R" Us. Inc. v. Step Two. S.A.*, 318 F.3d 446, 457 (3d Cir.2003).

Moreover, Defendant has undoubtedly transacted business in the United States, as its contract with the Connecticut-based Triorient demonstrates, and, according to the contract, the cargo that Defendant purchased was to be shipped from an American port. (*See* Contract, Def.'s Br. Ex. 3.)

However, the Supreme Court has made clear that a contract alone cannot establish sufficient minimum contacts in the home forum of the other party. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *BP Chemicals, Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 260 (3d Cir.2000); *see also Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 32 (3d Cir.1993) ("a nonresident's contracting with a forum resident, without more, is insufficient to establish the 'minimum contacts' required for the exercise of personal jurisdiction over the nonresident.").

The Court further informs us that, with respect to establishing specific jurisdiction, "[i]t is ... prior negotiations and contemplated future consequences [of the contract], along with the terms of the contract and the parties' actual course of dealing [ ] that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King*, 471 U.S. at 479; *BP Chemicals*, 229 F.3d at 260.

Given the uncertainty with respect to possible Sinochem enterprises that do business in the United States or any Sinochem business that has an effect on the United States, as well the instruction provided us by the Supreme Court in *Burger King* regarding the significant aspects of Defendant's contract for determining jurisdiction, we would be inclined to allow limited discovery to determine whether Plaintiff can establish personal jurisdiction, either through the identification of other enterprises that Plaintiff claims could be related, or through additional information with respect to the parties' dealings. So long as Plaintiff alleges facts "that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained.'" *Id.* at 456 (quoting *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992)).

Plaintiff's allegations with respect to other Defendant enterprises in the country, as well as the undisputed facts

averred with respect to the [sic] how the contract was carried out, render Plaintiff's claim far from frivolous. Thus, we would refrain from ruling on whether the federal long-arm statute, Rule 4(k)(2), permits personal jurisdiction over Defendant until after the parties had taken limited jurisdictional discovery. However, as the ensuing analysis shows, this discovery will not be necessary because we will dismiss this matter for *forum non conveniens*.

**C. *Forum Non Conveniens***

Defendant next argues that, even if we were to find the requisite subject matter and personal jurisdiction, we still should decline jurisdiction in this matter for *forum non conveniens*, as the witnesses to this matter, many of whom are based in Asia, reside outside this jurisdiction. (Def.'s Br. at 17.) Preliminarily, we note that we are required to indicate how much deference to pay to this foreign plaintiff's choice of forum. Consistent with our sister court's prior findings, "we will not lightly disturb plaintiff's choice of forum and will hold defendant[ ] to establishing a strong preponderance in favor of dismissal." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir.1991) (Lacey II) (quoting *Lacey v. Cessna Aircraft Co.*, 736 F.Supp. 662, 664 (W.D.Pa.1990), *rev'd on other grounds* by *Lacey II*).

To warrant a dismissal on these grounds, Defendant bears the burden of establishing two elements: an adequate alternative forum and that both public interest and private factors weigh heavily towards dismissing the case. *Id.* at 180.

A defendant typically can satisfy the first element by showing that it is "amenable to process" in another jurisdiction. *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)) (citation omitted in original). As reflected in the absence of any argument to the contrary from Plaintiff, the existence of the parallel proceeding commenced by Defendant in Chinese Admiralty Court easily establishes the existence of an adequate alternative forum.

We next consider the private interest factors, which include:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make a trial of a case easy, expeditious and inexpensive.

*Id.* at 180 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

The main witnesses with respect to the loading of the ship would be personnel from the stevedoring company that loaded the cargo onto the ship and the crew members of the vessel that sailed it to China, as well as "surveyors retained on behalf of the various vessel interests and shipper, [and] the local agent." (*See* Pl.'s Br. at 23 (identifying some of the witnesses.)) Additionally, Defendant's representatives who made the alleged misrepresentations to the Chinese Admiralty Court would also have to be available. The only such persons clearly associated with the United States are the Novolog employees who loaded the cargo on the ship. The members of the crew are Filipino[8] and Defendant's representatives are Chinese. While Plaintiff argues that neither the surveyors nor the local agent are located in China, Plaintiff fails to identify their connection to the United States.

Furthermore, while we acknowledge Plaintiff's averments that the Chinese system of discovery and documentation may not be as broad or as facilitative as the American system, we have no reason to doubt the competence and justness of the system the Chinese courts do have in place. (*See* Lu Min

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[8] Def.'s Br. Ex. 5. While it appears as though Exhibit 5 may not include the entire list of crew members—it is p. 2 of a facsimile and the names through the bottom of the sheet suggest that there could be a continuation—we accept it as the full list, as Plaintiff does not contest it and Lu Min avers to it. (*See* Lu Min Decl. ¶ 13.)

Reply Decl. ¶ 6.)[9] Additionally, because irrespective of our ruling here, Plaintiff still must litigate this matter in the Chinese court, the costs inherent in translation and interpretation would only increase if we maintained jurisdiction. The existence of the Chinese litigation, which would require travel to China anyway, further negates Plaintiff's argument with respect to the travel costs of American witnesses.

Additionally, we must consider public interest factors in determining *forum non conveniens*, which include:

> the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws; and the unfairness of burdening citizens in an unrelated forum with jury duty.

*Id.* (quoting *Piper*, 454 U.S. at 241 n.6)).

The sole applicable public interest issue here involves choice of law, and we find that such an analysis would render this matter one of Chinese law. A choice of law analysis requires, as a threshold issue, that we establish whether this matter implicates significant U.S. interests. In other words, we must find one of five factors:

> 1) injury to an American seaman or a seaman with America [sic] dependents,
> 2) injury in American territory,
> 3) American defendants,
> 4) an American flagged ship, or
> 5) a contractual choice of law clause specifying American law.

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[9] While we recognize that the declaration of Plaintiff's witness describes China's discovery procedure more negatively than that of Defendant's witness (*Compare* Huang Ya Quan Unsworn Decl. ¶ 15 *with* Lu Min Reply Decl. ¶ 6), and we are required to interpret factual disputes in favor of Plaintiff, the non-moving party, we do not find their statements to be inconsistent.

*Neely*, 63 F.3d at 182.[10] The undisputed relevant facts reflect an absence of the first four factors.

The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates. (*See* Conditions of Carriage for Bill of Lading, Pl.'s Br. Ex. A.) However, the letter identifying U.S. law as the law of choice in the charter party does not state whether the charter party calls for U.S. law to apply specifically to this type of negligence matter, and the context of the letter suggests that Pan Ocean's concession regarding American law resulted from an inquiry from Plaintiff with respect *not* to this suit or any allegations of negligence by Defendant, but rather with respect to Plaintiff's attempts under Chinese law to secure release of its vessel. (*See* Pl.'s Br. Ex. A, Clyde & Co. letter (stating both that the carrier was "prepared to indicate that the [charter party] provides for New York arbitration with U.S. law to apply," but that their "understanding of PRC law [ ][was] that such a provision . . . [was] unlikely indeed to induce the Chinese court to order the release of the vessel without security.")).

Furthermore, while we recognize that the bill of lading, especially as it incorporates the charter party, calls for the application of U.S. law, we disagree with Plaintiff's argument that it has any relevance to this negligence matter. (*See* Pl.'s Br. at 29.) The allegations of fraud underlying the negligence claim involve the issuance of the bill of lading, not the actual conditions of carriage, such as the handling of the cargo, to which the choice of law provision in the bill of lading would apply. Stated another way, Plaintiff does not allege a violation with respect to the nature of the carrier's duties to be carried out pursuant to the bill of lading and carriage contract, such as the manner of loading, conditions in transit, or protection of the cargo.

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[10] Upon meeting this threshold, we would have to determine whether it would reasonable, under the circumstances, to apply American law. *Id.* For purposes of our analysis, we need not make this finding, as it would not affect our determination regarding *forum non conveniens*.

Rather, its dispute involves solely the date on which the cargo was loaded and whether Plaintiff fraudulently backdated the bill of lading, thus validating the contract for the sale of the steel coils and allowing the buyer to withdraw monies from Defendant's line of credit. This matter does not implicate the choice of law clause in the bill of lading; rather, the choice of law clause more applicable to this matter is that of the purchase contract of the steel coils, which calls for the use of Chinese law.

The Third Circuit has stated that one of the two main purposes for conducting a choice of law analysis with respect to admiralty law "is to assure that American maritime law is not applied to incidents that lack any significant American connection." *Neely*, 63 F.3d at 181. We find that this matter "lack[s] any significant American connection." While the loading of the cargo, the date of which we concede is critical to the matter, occurred in the United States, Plaintiff's claim does not allege any wrongdoing with respect to the manner in which the American company loaded the cargo, the environment at the U.S. port where the cargo was loaded, or the general handling of the cargo. Indeed, no American company is a defendant, much less a party to this matter.

Moreover, the loading of the cargo could have happened anywhere in the world and it would not have changed the circumstances of this litigation; the fact that it occurred at a U.S. port by an American stevedoring company was a function of the purchase contract with a nonparty to this matter, not alleged in this suit to have engaged in any wrongdoing. The actual injury, the arrest of the vessel, occurred in Chinese territory, pursuant to an order by a Chinese court, at the request of a Chinese corporation. The interests of the United States are not implicated here.

As such, we find that, despite the deference we pay to Plaintiff's choice of forum, we find that Defendant has established a strong preponderance of dismissal, as this matter is best litigated in the Chinese Admiralty Court.[11]

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[11] Aside from legal argument, we are confident that the Chinese Admiralty Court can competently and justly handle this matter. Plaintiff

The existence of a parallel proceeding in the Chinese Admiralty Court negates any argument of convenience with respect to litigating the matter here, as, irrespective of our ruling, Plaintiff will have to litigate this matter in China. Moreover, with the exception of the American employees of the stevedoring company who loaded the vessel, most, if not all, of the witnesses are based in Asia. Finally, the Chinese Admiralty Court arrested the Malaysian vessel at a Chinese port, pursuant to Chinese law, at the request of a Chinese corporation; no American companies or interests are at stake. We have no reason to second-guess the authority of Chinese law or the competence of its courts; this matter is appropriately addressed there. We grant Defendant's Motion to Dismiss and close this case on grounds of *forum non conveniens*.[12]

## III. CONCLUSION

Defendant filed the instant Motion to Dismiss, pursuant to Fed.R.Civ.P. 12, on grounds of lack of subject matter jurisdiction, personal jurisdiction, *forum non conveniens*, and forum-shopping. We find that while we do have subject

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(continued...)

does not contest that the Chinese Admiralty Court is a well-established court, which handles more than 2000 cases per year, the majority of which involve non-Chinese parties, or that the presiding judge on this matter has nineteen years of judicial experience. (Lu Min Decl. ¶¶ 19, 21.) Additionally, while there seems to be some disagreement as to the extent of Chinese discovery and evidentiary practice relative to that in the United States, the Chinese system appears to have competent and orderly practice and procedure capable of justly addressing matters involving foreign entities. (*Compare* Huang Ya Quan Affirm. ¶¶ 14-15, 17 *with* Lu Min Decl. ¶¶ 6-8 (debating China's discovery practice and its evidentiary procedure regarding witness testimony.)) Moreover, neither party should face any prejudice regarding discovery available in the United States because, as Defendant has utilized in a related matter before the Chinese court, our system permits the use of the American discovery process for the purpose of foreign litigation.

[12] Because we dismiss this case for *forum non conveniens*, we need not reach Defendant's arguments regarding the rules of international comity and forum-shopping.

matter jurisdiction, and may have personal jurisdiction, because the Chinese Admiralty Court is competent and in the best position to try this matter between Asian parties, we grant the motion on grounds of *forum non conveniens*. As such, we need not reach the issue of forum-shopping. An appropriate order follows.

**ORDER**

AND NOW, this 27th day of February, 2004, after full consideration of Defendant's Motion to Dismiss, filed January 5, 2004, Plaintiff's response thereto, filed February 4, 2004, and Defendant's reply, filed February 17, 2004, it is hereby ORDERED that said motion is GRANTED and this case is DISMISSED without prejudice to Plaintiff's right to proceed on this matter in the appropriate Chinese Admiralty Court. This case is closed.

## U.S. Constitution: Fifth Amendment

### Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Federal Rules of Civil Procedure Rule 4**

United States Code Annotated

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

**Rule 4. Summons**

* * * *

**(k) Territorial Limits of Effective Service.**

* * * *

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

* * * *

(2)

No. 06-102

FILED
AUG 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

SINOCHEM INTERNATIONAL CO., LTD.,

*Petitioner,*

*v.*

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The Court of Appeals for the Third Circuit followed the holding in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), in determining that a court must have jurisdiction, and not merely hypothetical jurisdiction, before deciding a motion to dismiss based on *forum non conveniens*.

The question presented is:

Whether Petitioner has presented a compelling reason to grant the Petition, where the Third Circuit's Opinion does not conflict with a decision of this Court.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Malaysia International Shipping Corporation has the following parent corporations:

**Malaysia International Shipping Corporation Berhad**

**Petroliam Nasional Berhad** is the only publicly held company that holds 10% or more of the Respondent's stock.

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## INTRODUCTION

Petitioner has presented no compelling reason for its Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Third Circuit's Opinion, dated February 7, 2006, presents a compelling reason that is in conflict with a decision of this Court.

Through a slick interweaving of largely irrelevant factors detailing the highlights of a shipowner (Respondent) and its dealings with a Chinese government owned steel importer (Petitioner), Sinochem obfuscates the obvious: A court should have jurisdiction before it hears a dispute. Failure to make that determination before engaging in a time-consuming and costly *forum non conveniens* analysis is not a practice favored by courts, and thus no review is warranted by this Court.

## STATEMENT OF THE CASE

As was detailed in the record, Petitioner, Sinochem, appeared first in a U.S. court seeking to have discovery issued related to its desire to arrest vessels in China. MISC, Respondent, instituted the present lawsuit on June 23, 2003, by filing an initial pleading against Sinochem in the United States District Court for the Eastern District of Pennsylvania.[1] Sinochem refused to accept service despite the ready presence of its Pennsylvania or New York counsel, or to sign a Waiver of Service of Summons. Therefore, MISC was required to serve Sinochem, a Chinese corporation, pursuant to the Hague

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1. To clarify the record as stated by Sinochem, the U.S. Complaint was filed before the Chinese Complaint.

Convention.[2] As required by the Hague Convention, MISC had the Complaint translated into Chinese, and then sent a Request for Service Abroad of Judicial or Extrajudicial Documents to the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China. The Amended Complaint ultimately was served on Sinochem on December 15, 2003.

On January 5, 2004, Sinochem filed a Motion to Dismiss the Amended Complaint on various grounds; the district court granted the Motion to Dismiss. The dismissal was based entirely on the doctrine of *forum non conveniens*. The Third Circuit vacated and remanded the action to the district court, after holding that a court must first ascertain the underpinnings of any civil action, namely subject matter jurisdiction but specifically personal jurisdiction, before conducting a *forum non conveniens* analysis.

The district court had determined that this was an admiralty/maritime matter and, therefore, it had subject matter jurisdiction over the case. Sinochem did not appeal this ruling. The district court also determined that limited jurisdictional discovery could establish personal jurisdiction through the federal long-arm statute. Sinochem did not appeal this ruling either.

Although Respondent contests the relevance of much of the factual underpinnings in Petitioner's Petition, pursuant to Sup. Ct. R. 15.2, it corrects the following issues and statements:

• Respondent disputes the characterization that a sizable number of the relevant acts, and most of the relevant witnesses and documents, are located in China.

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2. The Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, signed at The Hague, November 15, 1965.

• Additionally, rather than "deepen[ing] the split" among the circuit courts, the Third Circuit joins three other circuits in so holding. And indeed, the D.C. Circuit decision has been framed as outdated by reference to subsequent Supreme Court rulings. Finally, a cogent analysis by the Third Circuit addresses any remaining concerns to the Second Circuit decision referenced.

• Respondent disputes Petitioner's assertion that MISC accepted the Chinese Court as an adequate forum for a negligent misrepresentation claim based on a bill of lading. It is beyond the realm that Petitioner believes that a Malaysian shipowner would institute suit in China for negligent misrepresentations made by a Chinese government-owned company, versus some other venue such as the United States (where the vessel loaded), or Malaysia (corporate home of the shipowner).

• Any potential "waste of resources" required under the Third Circuit ruling, to the extent there are any, rests only with this case. There is certainly no suggestion of that issue moving forward, as the court's opinion lays out a clear and simple standard, based on court precedent.

## REASONS FOR DENYING THE PETITION

This Court addresses the issue of the application of the doctrine of *forum non conveniens* with regard to personal jurisdiction in its opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The language pertaining to jurisdiction is clear and unequivocal. This Court held that "[i]ndeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Id.* at 504. (emphasis added). In fact, the holding is premised on prior cases, where historically the Court has held that absent a finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

*Ex parte McCardle*, 74 U.S. 506, 514 (1868).

The Third Circuit decision presents a compelling rationale for its holding, and it is not in conflict with this court. Without the finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate other issues – including a determination of *forum non conveniens*. Petitioner argues that there has been some dispute among the Circuits as to whether *forum non conveniens* is a "non-merits" grounds for dismissal, and, therefore, may be adjudicated prior to the establishment of jurisdiction. The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In Re Arbitration Between Monegasque De*

*Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002). Similarly, in *In re Minister Papandreou*, 139 F.3d 247 (D.C. Circuit 1998), the D.C. Circuit held that *forum non-conveniens* is a "non-merits" grounds for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou* at 255. (Note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas, AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).)

As the Third Circuit noted in its opinion, the Fifth Circuit expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005), the Court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. The Third Circuit then went on to highlight decisions by other circuits in accord (the Seventh and the Ninth), and distinguished cogently the deficiencies in the Second Circuit opinion, and the timing of the D.C. Court opinion in relation to subsequent Supreme Court rulings.

The notion of discovery for the purpose of establishing personal jurisdiction is not new to district courts. In *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455-458 (3d Cir. 2003), the Third Circuit held that the district court erred in **not** allowing jurisdictional discovery. (emphasis added). Respondent respectfully disagrees that the requirement for ascertaining jurisdiction results in judicial inefficiency. Specifically, it is appropriate that if the need for an examination of personal jurisdiction is required, the parties can undertake the bulk of the action on their own, without court intervention. Compare that with the intensive and time-consuming analysis that takes place under the existing *forum*

*non conveniens* analysis, and one will acknowledge that the goals of Fed. R. Civ. P. 1, to "secure the just, speedy, and inexpensive determination of every action", are in fact achieved.

Respondent also disagrees with Petitioner's assertion that reversal of the Third Circuit will further respect other nations' judicial systems. Fortunately, the court in China disagreed with that notion as well, and as noted by the Third Circuit, the Chinese High Court determined that: "Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether [MISC] has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case."

Respondent further maintains that the Petition should be denied because, contrary to petitioner's assertion, the Third Circuit rule is indeed more efficient. An analysis of time would clearly show that courts spend significant resources on conducting a *forum non conveniens* analysis. Ascertaining the presence of jurisdiction first will result in fewer such exercises, and thus does not empty the quiver so quickly as the Third Circuit portends.

## CONCLUSION

The district court committed reversible error in not ordering limited discovery to allow Respondent to attempt to establish personal jurisdiction over Petitioner, Sinochem International Corp., pursuant to the federal long-arm statute. Indeed, the district court had no constitutional authority to proceed in this matter and address Petitioner's claim of *forum non conveniens* until proper jurisdiction has been established. The Third Circuit decided the question correctly, and also provides a clear rule such that further review by this Court is not necessary. Accordingly, Petitioner has not established any compelling reason for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

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IN THE

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SINOCHEM INTERNATIONAL CO. LTD.,

*Petitioner*,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY FOR PETITIONER

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## REPLY FOR PETITIONER

The issue in this case is whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*. A divided panel of the Court of Appeals for the Third Circuit answered "yes" to that question. As the Petition demonstrated, the Third Circuit's decision conflicts with recent precedent from this Court; deepens the existing 2-4 split among circuits on this issue; is inconsistent with the interests of judicial economy (as the Third Circuit itself acknowledged in inviting this Court's review); and presents an ideal vehicle for resolving the split.

Respondent does not take issue with most of these showings. Indeed, respondent specifically acknowledges the existence of a square conflict among the Courts of Appeals on the question presented. Nevertheless, respondent argues that certiorari is not warranted because the issue is not "compelling" and because the decision below does not conflict with any of this Court's decisions. *See* Opp. at 1, 7. But it is no answer for respondent to merely intone the conclusion that there is no "compelling" reason for review, while ignoring all of the compelling reasons for review (including conflict with this Court's decisions) set forth in the Petition.

1. Respondent does not dispute the deep and abiding conflict among the Courts of Appeals on the very question presented here. Opp. at 5. Indeed, the Brief in Opposition highlights and confirms the conflict (*id.* at 4-5), which was set forth in detail in the Petition (at 13-18). Respondent offers only an unelaborated, parenthetical "Note" (Opp. at 5), indicating that one of the decisions agreeing with Sinochem's position, *In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998), preceded *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and is, therefore, "outdated." Opp. at 3. That objection is baseless: As the Petition

demonstrated (at 9-10), this Court in *Ruhrgas* relied on (and quoted) *Papandreou* in reaching its holding.[1] And, in all events, the D.C. Circuit recently reaffirmed *Papandreou*'s vitality, *see Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006).

2. Without seriously discussing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999),[2] or citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), or the several other decisions from this Court that were cited in the Petition, respondent claims that the Third Circuit's decision is consistent with Supreme Court precedent. Respondent cites only *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Ex parte McCardle*, 74 U.S. 506 (1868), which, respondent says, stand for the proposition that "[w]ithout the finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate other issues—including a determination of *forum non conveniens*." Opp. at 4.

In effect, respondent takes the position that jurisdiction always, without exception, must be decided first. But this Court's decisions hold otherwise. This Court has recognized that, so long as the merits are not decided before threshold non-merits issues, "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a

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[1] In holding that personal jurisdiction may be decided prior to subject-matter jurisdiction, *Ruhrgas* actually quoted *Papandreou*. *Ruhrgas*, 526 U.S. at 584-85 ("'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles'") (quoting *In re Papandreou*, 139 F.3d at 255). Notably, as the Petition showed (at 9-10) , the full quote in *Papandreou* refers to "non-merits grounds such as *forum non conveniens* and personal jurisdiction . . . ."

[2] Respondent's only citation to *Ruhrgas* is in its erroneous discussion of the vitality of *In re Papandreou*, 139 F.3d 247. Opp. at 5; *see* n.1, *supra*.

case on the merits." *Ruhrgas*, 526 U.S. at 585. Indeed, as this Court stated in *Steel Co.*, the sequencing is not nearly as absolute as respondent would have it: This Court's cases "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question. . . ." 523 U.S. at 101.

Respondent's confusion may stem from an overly rigid reading of this Court's rejection of "hypothetical jurisdiction" in *Steel Co.*, 523 U.S. at 99-101; the Third Circuit's opinion in this case certainly reflected that tendency. *See* Pet. App. 17a, 26a, 28a-29a; *but see id.* at 33a-36a (Stapleton, J., dissenting). Nonetheless, this Court has made clear that the prohibition against "hypothetical jurisdiction" applies only to merits determinations, such as "pronounc[ing] upon the meaning or the constitutionality of a state or federal law. . . ." *Steel Co.*, 523 U.S. at 101; *see also id.* at 96. But the bar on asserting "hypothetical jurisdiction" does not prohibit decisions on "discretionary jurisdictional question[s]." *Id.* at 100 n.3.

Thus, in *Steel Co.* itself, the Court approved of the district court's decision to decline pendent jurisdiction without deciding whether such jurisdiction extended to state-law claims against a new party, *Steel Co.*, 523 U.S. at 100 n.3 (citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973)); approved of abstaining on *Younger* grounds before ascertaining whether there was a "case or controversy," *Steel Co.*, 523 U.S. at 100 n.3 (citing *Ellis v. Dyson*, 421 U.S. 426, 436 (1975)); and noted that statutory standing questions can be given priority over Article III questions, *Steel Co.*, 523 U.S. at 97 n.2. *See also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (endorsing the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before considering "whether the Eleventh Amendment forbids [the] . . . statutory cause of action"). If respondent's view of the law were correct, then each of these cases would have come out the other way.

Furthermore, this Court has held that the *forum non conveniens* doctrine is a "supervening venue" provision, adjudication of which is a matter of procedure, rather than substance, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453-54 (1994), and thus, not a decision on the merits, *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). And, in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), this Court itself resolved a venue question antecedent to a personal-jurisdiction question. *Id.* at 180.

Thus, respondent's reliance on broad statements in *Gulf Oil* and *McCardle*—neither of which came remotely close to addressing the question presented here—ignores this Court's subsequent cases, which have allowed flexibility in determining which threshold ground is more efficient for dismissing a case. If anything, the continuing confusion over the breadth of the ban on "hypothetical jurisdiction" only underscores the importance of having this Court decide the issue and provide needed clarity in this area of the law. *See, e.g.*, Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 304-36 (1999).

3. Respondent does not dispute the recurring and important nature of the question presented. And indeed there can be no dispute on this score, as the Petition demonstrated (at 22-26), as the Third Circuit itself acknowledged (Pet. App. 26a), and as commentators, whichever side of the split they endorse, have recognized. Pet. at 23.

As petitioner has further explained, the Third Circuit's rule undercuts the goals of the *forum non conveniens* doctrine, which, due to the globalization of commerce, will only increase in importance in the future. Pet. at 22-24. Respondent offers only the conclusory response (with no explanation, Opp. at 6) that "respect [for] other nations' judicial systems" would not be served by reversing the Third Circuit, and appears to argue, perplexingly, that it is

"[f]ortunat[e]" that this dispute will be litigated simultaneously in both China and the United States. *Id.*

4. Respondent is mistaken in claiming that the decision below is efficient and correct. Opp. at 3, 5-6.

a. Respondent suggests (Opp. at 6) that "an analysis of time would clearly show" that it is more efficient to ascertain jurisdiction than to adjudicate a *forum non conveniens* motion. However, respondent offers no such "analysis of time," and it strains credulity to suppose that it is more efficient for courts and litigants to add a further layer of discovery and litigation just to enable a court to abstain by dismissing for *forum non conveniens*. Even the Third Circuit acknowledged that its rule "may not seem to comport with the general interests of judicial economy." Pet. App. 26a.

As the Petition showed (at 18-20), the twin goals of *forum non conveniens* expose the inefficiencies of the Third Circuit's rule. Neither the private-interest component of the equation (the convenience of the parties) nor the public-interest component (burdening the court and the jury, *see Am. Dredging Co.*, 510 U.S. at 448; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981), *reh'g denied*, 455 U.S. 928 (1982)), is served by this rule. In this case, where the district court found only the most tenuous connection to the United States (Pet. App. 66a), the parties should not be forced to engage in full-blown United States discovery and litigation to determine the existence of personal jurisdiction over Sinochem—just so the district court can dismiss the suit for *forum non conveniens*. Pet. at 19-20.

b. Respondent offers no answer to petitioner's showing (Pet. at 20-22) that the doctrine of constitutional avoidance is better served by dismissing a case on *forum non conveniens* grounds rather than engaging in a difficult jurisdictional analysis that may force the court to "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. *Leroy*, 443 U.S. at 181. As this Court explained in *Leroy*, establishing personal

jurisdiction, particularly through discovery, can present difficult constitutional questions, quite apart from the extensive fact-finding that may be required to determine the extent of an individual's or a company's contacts with the United States. *Id.*

c. Respondent appears to disagree with petitioner's showing that dismissal of this case on *forum non conveniens* grounds, to leave adjudication of this dispute solely to the Chinese courts, would promote international comity. Opp. at 6. However, underlying the doctrine of *forum non conveniens* is the recognition that other countries' judicial systems can provide an adequate alternative forum, *see, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 254 n.22, and thus, international comity is part and parcel of that doctrine, *see, e.g., Am. Dredging Co.*, 510 U.S. at 464-67; *see* Pet. at 24. As the district court here stated, it has "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter." Pet. App. 67a n.11.

5. Finally, respondent does not dispute that this case presents an ideal vehicle for resolving the split. As petitioner explained (Pet. at 25), the question is cleanly presented here, and both the majority and the dissent have thoroughly ventilated the issue with the benefit of the considered and divergent views of other Courts of Appeals. Furthermore, in view of the Chinese proceeding, there is no question of whether an adequate alternative forum exists (Pet. at 26), and it does not appear that respondent has had any difficulty defending itself, nor has it protested at any unfairness on the part of the Chinese court system.

## CONCLUSION

For these reasons, and those stated in the Petition, certiorari should be granted.

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*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## JOINT APPENDIX

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**United States District Court**
**Eastern District of Pennsylvania (Philadelphia)**
**CIVIL DOCKET FOR CASE #: 2:03-cv-03771-TON**

| Date Filed | # | Docket Text |
|---|---|---|
| 06/23/2003 | 1 | COMPLAINT against SINOCHEM INTERNATIONAL CO. LTD. (Filing fee $ 150 receipt number 892960.), filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION.(ti, ) (En-tered: 06/23/2003) |
| 06/23/2003 | | One Original Summons Issued as to SINOCHEM INTERNATIONAL CO. LTD. Forwarded To: Counsel on 6/23/03 (ti, ) (Entered: 06/24/2003) |
| 07/07/2003 | 2 | AMENDED COMPLAINT against SINOCHEM INTERNATIONAL CO. LTD. , filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION.(ph, ) (Entered: 07/08/2003) |
| 07/07/2003 | | Summons Issued on amended complaint as to SINOCHEM INTERNATIONAL CO. LTD. Forwarded To: A. Higgins, Esq. on 7/8/03 (ph, ) (Entered: 07/08/2003) |
| 01/05/2004 | 3 | MOTION TO DISMISS THE AMENDED COMPLAINT IN THIS ACTION, MEMORANDUM, DISCLO-SURE STATEMENT PURSUANT TO 7.1, DECLARATION OF LU MIN, CERTIFICATE OF SERVICE filed by SINOCHEM INTERNATIONAL CO. LTD..(ph, ) (Entered: 01/05/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 01/05/2004 | | Letter to Attorney STEPHEN M. HUDSPETH, ESQ. re: L.R. 83.5 and 83.5.2. (ph, ) (Entered: 01/05/2004) |
| 01/06/2004 | 4 | Declaration of Sun Dacheng, Certificate of Service. (DT) (Entered: 01/07/2004) |
| 01/20/2004 | 5 | Request for Extension of Time to File Response/Reply to *Defendant's Motion to Dismiss* filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION, Certificate of Service. (Attachments: # 1 Text of Proposed Order) (CARVELL, DIANE) Modified on 1/21/2004 (np). (Entered: 01/20/2004) |
| 01/22/2004 | 6 | ORDER THAT UPON REQUEST OF PLAINTIFF, IT IS ORDERED THAT THE TIME TO RESPOND TO DEFENDANT'S MOTION TO DISMISS IS EXTENDED THROUGH 2/2/04. SIGNED BY JUDGE FRANKLIN S. VAN ANTWERPEN ON 1/22/04. 1/23/04 ENTERED AND COPIES MAILED (ph, ) (Entered: 01/23/2004) |
| 01/22/2004 | | Set/Reset Deadlines as to [3] MOTION to Dismiss. RESPONSES DUE BY 2/2/2004. (ph, ) (Entered: 01/23/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 02/02/2004 | 7 | RESPONSE in Opposition re [3] MOTION to Dismiss *Amended Complaint* filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION, Certificate of Service. (Attachments: # 1 # 2 # 3 # 4) (HIGGINS, ANN-MICHELE) Modified on 2/4/2004 (np). (Entered: 02/02/2004) |
| 02/04/2004 | 8 | PLAINTIFF MALAYSIA INTERNATIONAL SHIPPING CORPORATION'S Corrected Response in Opposition to DEFENDANT'S MOTION TO DIS-MISS AMENDED COMPLAINT, Certificate of Service. (Attachments: # 1 Proposed Order # 2Bill of Landing # 3 Application # 4 Affirmation of Huang Ya Quan)(HIGGINS, ANN-MICHELE) Modified on 2/5/2004 (fh) (Entered: 02/04/2004) |
| 02/06/2004 | 9 | MOTION FOR LEAVE OF COURT TO FILE A REPLY BRIEF, MEMORANDUM, CERTIFICATE OF SERVICE filed by SINOCHEM INTERNATION-AL CO. LTD...(ph, ) (Entered: 02/06/2004) |
| 02/09/2004 | 10 | ORDER THAT DEFENDANT'S MOTION FOR LEAVE OF COURT TO FILE A REPLY BRIEF IS GRANTED, THE REPLY BRIEF NOT TO EXCEED 12 PAGES AND TO BE SERVED NO LATER THAN 7 DAYS AFTER THE DATE OF ENTRY OF THIS ORDER. . SIGNED BY JUDGE FRANKLIN S. VAN ANTWERPEN ON 2/9/04.2/9/04 |

| Date Filed | # | Docket Text |
|---|---|---|
| | | ENTERED AND COPIES MAILED (ph, ) (Entered: 02/09/2004) |
| 02/17/2004 | 11 | Reply Memorandum in support of its motion to dismiss the amended complaint, Declaration in support of reply memorandum, Certificate of service filed by SINOCHEM INTERNATIONAL CO. LTD.. (ph, ) (Entered: 02/18/2004) |
| 03/01/2004 | 12 | MEMORANDUM AND ORDER THAT DEFENDANT'S MOTION TO DIS-MISS IS GRANTED AND THE CASE IS DISMISSED WITHOUT PRE-JUDICE TO PLAINTIFF'S RIGHT TO PROCEED ON THIS MATTER IN THE APPROPRIATE CHINESE ADMI-RALTY COURT. SIGNED BY JUDGE FRANKLIN S. VAN ANTWERPEN ON 2/27/04. 3/1/04 ENTERED AND COPIES MAILED . (stb, ) Modified on 3/2/2004 (stb, ). (Entered: 03/01/2004) |
| 03/01/2004 | 13 | Declarations in Support of Defendant's Reply Memorandum. Certificate of Service (stb, ) (Entered: 03/01/2004) |
| 03/15/2004 | 14 | MOTION for Reconsideration filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION. Certificate of Service. (Attachments: # 1 Affidavit) (HIGGINS, ANN-MICHELE) (Entered: 03/15/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 03/15/2004 | 15 | Memorandum in Support of motion for reconsideration, Certificate of service filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION. (ph, ) Additional attachment(s) added on 3/17/2004 (mar, ). (Entered: 03/16/ 2004) |
| 03/25/2004 | 16 | NOTICE OF APPEAL as to Order on Motion to Dismiss, by MALAYSIA INTERNATIONAL SHIPPING CORPORATION. Filing fee $ 255, receipt number 903430. Copies to Judge, Clerk USCA, Appeals Clerk and DIANE B. CARVELL (Attachments: # 1 exhibit a)(ph, ) (Entered: 03/26/2004) |
| 03/25/2004 | 17 | Clerk's Notice to USCA re 16 Notice of Appeal: (ph, ) (Entered: 03/26/2004) |
| 03/25/2004 | 18 | CERTIFICATE pursuant to FRAP 10(b)(1)(B) by DIANE B. CARVELL on behalf of MALAYSIA INTERNATIONAL SHIPPING CORPORATION re: no transcript will be ordered. (ph, ) (Entered: 03/26/2004) |
| 03/30/2004 | | NOTICE of Docketing Record on Appeal from USCA re 16 Notice of Appeal filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION. USCA Case Number 04-1816. (mar, ) (Entered: 03/30/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 03/30/2004 | 19 | Certified Copy of Order from USCA dated 3/30/04 that, it appearing that a timely post-decision motion of a type specified by FRAP 4(a)(4) is pending in the District Court, that the above-entitled appeal is stayed pending disposition of the motion. The parties are directed to file written reports addressing the status of the pending motion on 4/29/04 and every 30 days thereafter until the motion is determined. This stay does not apply to the obligation to pay filing and docketing fees. (mar, ) (Entered: 03/30/2004) |
| 03/31/2004 | 20 | MOTION for Leave to File *Reply Brief* filed by MALAYSIA INTERNATIONAL SHIPPING CORPORATION. Certificate of Service. (Attachments: # 1 Text of Proposed Order)(CARVELL, DIANE) (Entered: 03/31/2004) |
| 03/31/2004 | 21 | Copy of TPO Form re 16 Notice of Appeal: (ph, ) (Entered: 04/01/2004) |
| 04/01/2004 | 22 | Memorandum in Opposition to plaintiff's motion for reconsideration of the court's decision dismissing this action, Certificate of service filed by SINOCHEM INTERNATIONAL CO. LTD.. (ph, ) Additional attachment(s) added on 4/16/2004 (ph, ). (Entered: 04/02/2004) |

| Date Filed | # | Docket Text |
|---|---|---|
| 04/02/2004 | | RECORD COMPLETE FOR PURPOSES OF APPEAL. (mdg, ) (Entered: 04/02/2004) |
| 04/05/2004 | 23 | ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY BRIEF, PLAINTIFF SHALL HAVE UNTIL 4/7/04 TO FILE SAID REPLY BRIEF. . SIGNED BY JUDGE FRANKLIN S. VAN ANTWERPEN ON 4/5/04.4/5/04 ENTERED AND COPIES MAILED AND FAXED. (ph, ) (Entered: 04/05/2004) |
| 04/07/2004 | 24 | PLAINTIFF MALAYSIA INTERNATIONAL SHIPPING CORPORATION'S Reply Brief in Support of its 14 MOTION for Reconsideration *with Certificate of Service*. (Attachments: # 1 Exhibit Translation of Guangdong Higher Court Ruling)(HIGGINS, ANN-MICHELE) Modified on 4/8/2004 (fh) (Entered: 04/07/2004) |
| 04/14/2004 | 25 | MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION. . SIGNED BY JUDGE FRANKLIN S. VAN ANTWERPEN ON 4/14/04.4/15/04 ENTERED AND COPIES MAILED (ph, ) (Entered: 04/15/2004) |
| 03/02/2006 | 26 | ORDER of USCA DATED 2/7/06, that the judgment of the District Court entered 3/1/04, be, and the same is, hereby vacated and that the case is remanded for proceedings consistent |

| Date Filed | # | Docket Text |
|---|---|---|
| | | with this opinion. Costs taxed against appellee. (mjo, ) (Entered: 03/02/2006) |
| 03/07/2006 | 27 | ORDER THAT THIS CASE IS REASSIGNED FROM JUDGE FRANKLIN S. VAN ANTWERPEN TO JUDGE THOMAS N. ONEILL, JR FOR ALL FURTHER PROCEEDINGS. SIGNED BY CLERK OF COURT, MICHAEL E. KUNZ ON 3/7/06. 3/8/06 ENTERED AND COPIES MAILED AND E-MAILED.(le, ) (Entered: 03/08/2006) |
| 03/15/2006 | 28 | Notice of Change of Address by STEPHEN M. HUDSPETH, Certificate of Service. (le, ) (Entered: 03/15/2006) |
| 09/27/2006 | 29 | ORDER THAT THE CLERK OF COURT MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE THE MATTER IN THE CIVIL SUSPENSE FILE.. SIGNED BY JUDGE THOMAS N. ONEILL JR. ON 09/27/06. 09/28/06 ENTERED AND COPIES MAILED AND E-MAILED.(jjf, ) (Entered: 09/28/2006) |
| 10/02/2006 | 30 | Notice of Change of Address by STEPHEN M. HUDSPETH, Esquire with Certificate of Service. (le, ) (Entered: 10/02/2006) |

**General Docket**
**US Court of Appeals for the Third Circuit**
**No. 04-1816**

*Malaysia Shipping v. Sinochem Intl Co*

| Date | Entry |
|---|---|
| 3/30/04 | CIVIL CASE DOCKETED. Notice filed by Malaysia Shipping. [illegible] (lml) |
| 3/30/04 | CLERK ORDER - RULE 4(a)(4) Stay case pending disposition of post decision motion[s]. Status Report due 4/29/04. (lml) |
| 3/30/04 | Certified copy of order to Lower Court. (lml) |
| 3/31/04 | TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (lml) |
| 4/8/04 | APPEARANCE from Attorney Stephen M. Hudspeth on behalf of Appellee Sinochem Intl Co, filed. (lml) |
| 4/8/04 | (POSITIVE) DISCLOSURE STATEMENT on behalf of Appellee Sinochem Intl Co, filed. (lml) |
| 4/9/04 | APPEARANCE from Attorney Ann-Michele G. Higgins on behalf of Appellant Malaysia Shipping, filed. (lml) |
| 4/9/04 | (POSITIVE) DISCLOSURE STATEMENT on behalf of Appellant Malaysia Shipping, filed. (lml) |
| 4/9/04 | INFORMATION STATEMENT on behalf of Appellant Malaysia Shipping, received. (lml) |
| 4/9/04 | CONCISE SUMMARY OF CASE on behalf of Appellant Malaysia Shipping, received. (lml) |
| 4/14/04 | APPEARANCE from Attorney Diane B. Carvell on behalf of Appellant Malaysia Shipping, filed. (lml) |
| 4/22/04 | FINAL STATUS REPORT received from Stephen M. Hudspeth, Esq., counsel for Appellee Sinochem Intl Co. (lml) |

| | |
|---|---|
| 4/22/04 | COPY OF DECISION and ORDER of District Court dated 4/13/04 denying Plaintiff's motion for reconsideration, filed. (lml) |
| 4/27/04 | Appellee Sinochem Intl's Civil Appeal Information Statement, received. (lml) |
| 10/5/04 | CERTIFIED LIST filed. (lml) |
| 10/5/04 | BRIEFING NOTICE ISSUED. Appellant brief and appendix due 11/15/04. (lml) |
| 11/4/04 | Appellant Malaysia Shipping verbally granted an extension of time until 11/22/04 to file brief and appendix pursuant to LAR 31.4. (ghb) |
| 11/10/04 | Letter from Appellant Malaysia Shipping confirming extension of time pursuant to LAR 31.4 with service on opposing counsel. Service Date 11/9/04. (ghb) |
| 11/22/04 | ELECTRONIC BRIEF on behalf of Appellant Malaysia Shipping, Copies: 1, Pages: 45, Word Count: 9,579, delivered by mail, filed. Certificate of service date 11/22/04. Hard Copy Due (eh) |
| 11/22/04 | HARD COPY RECEIVED from Malaysia Shipping, 10 Copies. Hard Copy Due (lal) |
| 11/22/04 | APPENDIX on behalf of Appellant Malaysia Shipping Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 11/22/04. (lal) |
| 12/20/04 | BRIEF on behalf of Appellee Sinochem Intl Co. Copies: 10, Pages: 45, Word Count: 10,684, delivered by mail, filed. Certificate of service date 12/20/04. (gpk) |
| 12/23/04 | LETTER dated December 20, 2004 on behalf of Appellee regarding missing page from appendix. The page is attached to the letter, received. ZZ#SEND ZZ#TO ZZ#MERITS ZZ#PANEL (gpk) |
| 4/11/05 | CALENDARED for Tuesday, June 7, 2005. (clr) |

4/27/05 CLERK'S LETTER to counsel written at the direction of the Court advising counsel for Appellant to file a letter memorandum (original and 3 copies) by Tuesday, May 10, 2005, in response to the issue of the District Court's subject matter jurisdiction raised in notes 1 and 2 of the Appellee's brief. Response due by 5/10/05. (clr)

5/10/05 ANSWER/Letter Memorandum dated May 10, 2005, received from Ann-Michele G. Higgins, Esq., counsel for Appellant, addressing the issue of the District Court's subject matter jurisdiction raised in notes 1 and 2 of the Appellee's brief, submitted in direct response to the Court's request of April 27, 2005, filed. (clr)

5/16/05 CLERK'S LETTER to counsel written at the direction of the Court, counsel in the above captioned case are requested to file letter briefs by May 27, 2005, addressing whether, in light of ZZ_Gulf ZZ_Oil ZZ_Corp. ZZ_v. ZZ_Gilbert, 330 U.S. 501 (1947), and 15 Charles Alan Wright & Arthur R. Miller, ZZ_et ZZ_al., ZZ_Federal ZZ_Practice ZZ_& ZZ_Procedure ZZ_Section 3828 (2d ed. 1986), the District Court erred in failing to rule expressly whether it had personal jurisdiction over Sinochem Int'l Co., Ltd., before dismissing the action on the basis of ZZ_forum ZZ_non ZZ_conveniens. Response due by 5/27/05. (mac)

5/27/05 ANSWER/Letter Brief dated May 27, 2005, received via electronic transmission from Stephen M. Hudspeth, Esq., counsel for Appellee, Sinochem, addressing jurisdictional issues, in direct response to the Court's request of May 16, 2005, filed. (clr)

5/27/05 ANSWER/Letter Memorandum dated May 27, 2005, received via electronic transmission from

Ann-Michele G. Higgins, Esq., counsel for Appellant, addressing jurisdictional issues, in direct response to the Court's request of May 16, 2005, filed. (clr)

6/7/05 ARGUED Tuesday, June 7, 2005 Panel: Ambro, Stapleton, and *Alarcon, Circuit Judges. *(For the Ninth Circuit Court of Appeals, sitting by designation.) Counsel for Appellant: Ann-Michele G. Higgins and Counsel for Appellee: Stephen M. Hudspeth. (clr)

2/7/06 PRECEDENTIAL OPINION (Ambro, Authoring Judge, Stapleton, and *Alarcon, Circuit Judges), with separate dissenting opinion by Judge Stapleton, filed. Honorable Arthur L. Alarcon, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation. Total pages 53. (cmd)

2/7/06 JUDGMENT, It is ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered March 1, 2004, be, and the same is hereby VACATED and that the case is REMANDED for proceedings consistent with this opinion. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court, filed. (cmd)

2/8/06 ORDER AMENDING OPINION (Ambro, Authoring Judge, Stapleton, *Alarcon, Circuit Judges), IT IS NOW ORDERED that the published Opinion in the above case filed February 7, 2006, be amended as follows: On page 30, last line of text, after "(Breyer, C.J.)(same)." add two spaces and insert the following text: "Stated differently, but with the same requirement of jurisdiction, we have held that the ultimate inquiry of forum non conveniens "is whether the retention of jurisdiction by the district court would best serve the convenience of

the parties and the ends of justice." Mobil Tankers Co. S.A. v. Mene Grande Oil Co. 363 F.2d 611, 613 (3d Cir. 1966); see also Hoffman v. Goberman, 420 F. 2d 423, 426 (3d Cir. 1970) (same).", filed. *Honorable Arthur L. Alarcon, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation. (cmd)

2/22/06 BILL OF COSTS by Appellant Malaysia Shipping, filed. Certificate of Service dated 2/21/06. (cmd)

3/1/06 MANDATE ISSUED, filed. (tmk)

3/1/06 RECORD released. (tmk)

3/2/06 MOTION by Appellee Sinochem Intl Co to file petition for rehearing out of time, filed. Answer due 3/16/06. Certificate of Service dated 3/1/06. (cmd)

3/13/06 ORDER (Ambro, Circuit Judge) The foregoing motion by Appellee for leave to file Petition for Rehearing En Banc out of time is granted, filed. (cmd)

3/13/06 PETITION by Appellee for rehearing en banc, filed. Certificate of service dated 3/1/06. (cmd)

3/23/06 ORDER AMENDING OPINION (Ambro, Authoring Judge, Stapleton, and *Alarcon, Circuit Judges), filed. *Honorable Arthur L. Alarcon, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation. (cmd)

3/23/06 ORDER (Scirica, Chief Judge, Sloviter, Roth, McKee, Rendell, Barry, Ambro, Authoring Judge, Fuentes, Smith, Fisher, *Stapleton and *Alarcon, Circuit Judges) denying Appellee Sinochem Intl Co. petition for en banc rehearing, filed. *Honorable Walter K. Stapleton, Senior Judge, is limited to panel rehearing vote only.

**Honorable Arthur L. Alarcon, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, is limited to panel rehearing vote only. (cmd)

6/12/06 U.S. Supreme Court order dated 6/8/06, at S.C. number: 05A1134, extending the time to and including July 21, 2006 in which to file a petition for writ of certiorari, filed. (ghb)

7/31/06 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee Sinochem International Company, LTD. Filed in the Supreme Court on 7/24/06 at Supreme Ct. case number: 06-102. (ghb)

10/2/06 U.S. Supreme Court order dated 9/26/06, at S.C. number: 06-102, granting petition for writ of certiorari by Appellee Sinochem International Co., Ltd.. filed. (ghb)

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

September 26, 2006

Mr. Gregory A. Castanias
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001

Re: Sinochem International Co., Ltd.
v. Malaysia International Shipping Corporation
No. 06-102

Dear Mr. Castanias,

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/

William K. Suter, Clerk

**GUANGDONG HIGHER PEOPLE'S COURT,**
**THE PEOPLE'S REPUBLIC OF CHINA**

**Civil Ruling**

**(2004) Yue Gao Fa Li Min Zhong Zi No. 43**

**Appellant** (i.e. the Defendant of the first instance): **Malaysia International Shipping Corporation Herbad,** with its address at 3rd floor, Wisma MISC, 2 Jalan Conlay, PO Box 10371, Kuala Lumpur, Malaysia, and with Mr. Dato Hj. Mohd. Ali Hj. Yasin, its Director, as its legal representative.

**Appellee** (i.e. the Plaintiff of the first instance): **Sinochem International Trading Co., Ltd.**, with its address at 18th Floor, Jim Mao Tower, 88 Century Boulevard. Shanghai, and with Mr. Shi Guoliang, its Chairman, as its legal representative.

[2nd] Defendant of the first instance: **Pan Ocean Shipping Co. Ltd.**, with its address at Daehan Fire & Marine Insurance Building, 51-1Namchang-Dong Chung-ku, Seoul 100-178, South Korea.

The Appellant has made its appeal to this Court against the *(2003) Guang Hai Fa Chu Zi No. 348* Civil Ruling rendered by Guangzhou Admiralty Court in respect of the proceeding which involved the Appellant, the Appellee and the [2nd] Defendant of the first instance with reference to alleged tort damages caused by backdating of a Bill of Lading. The Appellant claims:

1. The dispute involved in this case represents the dispute involved in the underlying shipping contract of the Bill of Lading. Therefore, the proceeding instituted by the Appellee on the basis of the Bill of Lading should have been bound by the Bill of Lading and the relationship under the relevant shipping contract, and thus the Appellee does not have the right to institute the proceeding by tort. The ruling of

the trial of first instance failed to determine the legality of the cause of action asserted by the Appellee and falsely ruled that the case would not be bound by the provisions of the cargo shipping contract evidenced by the Bill of Lading, which constituting an error both in ascertainment of facts and application of law.

2. The Bill of Lading whereby the Appellee has instituted the proceeding has the specific wording "..... used together with the Charter-party" and "shipper: Pan Ocean Shipping Co. Ltd." Apparently, as an integral part of the Bill of Lading, any agreements under the charter-party executed by Pan Ocean Shipping Co. Ltd. represents the agreements embedded in the Bill of Lading.

3. Article 48 of the Charter-party, which should have constituted a part of the Bill of Lading, provides "Any dispute arising from the Contract which cannot be resolved in a friendly manner shall be submitted to arbitration in London." Furthermore, the same Charter-patty includes provisions on the governing law (i.e. British law) and on matters such as arbitrators and arbitration rules (i.e. the London Maritime Arbitration Commission). Therefore, the dispute involved in the Bill of Lading should have been submitted to the London Maritime Arbitration Commission for arbitration, and the Appellee should not have instituted the proceeding with the Guangzhou Admiralty Court.

In addition, the Appellant has instituted an action at a local U.S. court on June 23, 2003 with respect to the dispute in question, and such U.S. court issued a summons to the Appellee on the same date. The Appellee had not instituted its proceeding with Guangzhou Admiralty Court until July 23, 2003 (with the Appellant to receive the Defending Notice and a copy of the Complaint serviced by Guangzhou

Admiralty Court), which is later than the date of the action started by the Appellant in the U.S. Accordingly, Guangzhou should not have accepted to try the case instituted by the Appellee in respect of the same matter. This Court is requested to order that the court of first instance does not have the jurisdiction over the case in question and to quash the proceeding commenced by the Appellee. The Appellee has made no pleading in respect of the appeal of the Appellant.

Through its investigation, this Court is of the opinion that the case in question is a case involving foreign parties and learned that the Guangzhou Admiralty Court has arrested the M/V Handy Roseland which had performed the shipping under the same case. Under Articles 19 of the *Special Maritime Procedural Law of the People's Republic of China,* and Article 243 of the *Code of Civil Procedure of the People's Republic of China,* the Guangzhou Admiralty Court has jurisdiction over this case. The ruling rendered by the trial of first instance, under which the objection raised by the Appellant as to the jurisdiction over the case in question be rejected is correct, will be affirmed by this Court. Since the Appellee has initially instituted its proceeding on the ground of the joint tort feasance of the two co-defendants, the jurisdiction involved in this case shall not be bound by the arbitration clauses of the Bill of Lading or the maritime cargo shipping contract. In addition, though the Bill of Lading includes the wording ".....used together with the Charter-party", such Bill of Lading failed to specify whether the Charter-party or its arbitration clauses will be consolidated. Therefore, it shall be determined that the Bill of Lading has failed to agree on any arbitration provisions. Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether the Appellant has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case. Based on the foregoing, the appeal made by the Appellant is not justified on proper grounds and will thus not be supported by

this Court. In accordance with Articles 152 and 158 of the *Code of Civil Procedure of the People's Republic of China*, we hereby grant our ruling as follows:

The appeal be rejected and the ruling of the court of first instance affirmed; and

The Appellant be responsible for the payment of RMB50.00 as the charge for handling of the trial of second instance.

This Ruling shall be final.

Shi Shi, Chief Judge

Liu Menglang, Judge

Zhou Lanying, Acting Judge

(With seal of Guangdong Higher People's Court)

*[Date eligible]*

Tan Jujin, Clerk

Guangdon Provincial High Court
of the People's Republic of China

Civil Decision

Case No.: (2004) Yue Gao Fa Li Min Zhong Zi No. 43

**Appellant** (Defendant of first instance): Malaysia International Shipping Corporation Berhad

**Add**: 3rd floor, Wisma MISC, 2Jalan Conlay, PO. Box 10371, Kuala Lumpur, Malaysia

**Legal representative**: Dat'Hj. Hohd. Ali Hj: Yasin, Director

**Appellee** (Plaintiff of first instance): Sinochem International Co., Ltd.

**Add**: 18th floor, Jinmao Building, 88# Century Avenue, Pudong, Shanghai

**Legal Representative**: Shi Guo Liang, Chief Director

**Defendant of first instance**: Pan Ocean Shipping Co., Ltd.

**Add**: Daehan Fire & Marine Insurance Building, 51-1 Namchang – Dong Chung- ku, Seoul 100-178, South Korea

With respect to the case arising from the dispute over the liability for the tort of anti-dated bill of lading among the appellant Malaysia International Shipping Corporation Berhad (hereinafter referred to as the appellant), the appellee Sinochem International Co., Ltd., and the defendant of first instance Pan Ocean Shipping Co. Ltd., the appellant lodged an appeal to this court by virtue of disagreement of the *Civil Decision* under ref: (2003) Guang Hai Fa Chu Zi No. 348 issued by Guangzhou Maritime Court. The appellant claims that: 1: The dispute involved in this case concerns the relation of contract of carriage as presented in the bill of lading; the appellee lodged the lawsuit based on the bill of

lading, thus the bill of lading and the related relations of contract of carriage should be bounding to this case and the appellee should not be entitled to initiate the litigation based on tort. The *Civil Decision* of first instance, which did not examine the legitimacy of the basis on which the appellee lodged the case and judged that this case should not be bounded by the contract of carriage of goods by sea as presented in the bill of lading, is incorrect in either recognition of the facts or the application of law; 2. The bill of lading based on which the plaintiff brought the action clearly states that "to be used with charterparty" and "the name of the carrier: Pan Ocean Shipping Co. Ltd". It is obvious that the clauses in the charterparty signed by Pan Shipping Co. Ltd. as part of the bill of lading can be deemed as the clauses agreed on the bill of lading; 3. Article 48 of the charterparty incorporated into the bill of lading aforementioned states: "All disputes arising out of this contract which cannot be amicably resolved shall be referred to arbitration in London." The charterparty has also reached the agreement on the law to be applied (English Law), the arbitrators and the rules for arbitration (London Maritime Arbitration Committee). Therefore, the dispute arising from the bill of lading should be submitted to London Maritime Arbitration Committee and the appellee should not bring the litigation in Guangzhou Maritime Court. Moreover, the appellant had brought an action of the same dispute before the district court of the United States on 23rd June 2003 and the court issued subpoena to be plaintiff of this case on the same day. The appellee filed the action to Guangzhou Maritime Court in July 2003, which is later in time when appellant filed the action in the United States. Hence, Guangzhou Maritime Court should not entertain the action brought by the appellee against the appellant for the same dispute. Therefore, Guangazhou Maritime court has no jurisdiction over this case and is requested to reject the action brought by the appellee. The appellee Sinochem International Co., Ltd. did not response the appeal.

After examination, this court holds that: the case is about foreign-related maritime litigation, Guangzhou Maritime Court arrested the carrier of the cargo in question—M.V. "Handy Roseland", pursuant to Article 19 of *Special Maritime Procedure Law of the People's Republic of China* and Article 243 of *Civil Procedure Law of the People's Republic of China*, Guangzhou Maritime Court enjoys the jurisdiction over this case. The Decision made by the first instance court that rejected the disagreement proposed by Malaysia International Shipping Corporation Berhad is correct and should be supported. The plaintiff of first instance of this case—Sinochem International Co., Ltd.—lodged the litigation based on the joint tort committed by the two defendants, thus the jurisdiction of this case shall not be bounded by the bill of lading or the contract of carriage of goods by sea. Moreover, though the bill of lading in question is stated that "to be used together with the charterparty", it is not specified which charterparty or the arbitration clause in the charterparty is incorporated into the bill of lading or not, therefore, it should be deemed that there is no arbitration clause in the bill of lading. The People's Republic of China and the United States of America are two independent sovereignties and countries with different legal systems; whether the appellant—Malaysia International Shipping Corporation Berhad—lodged the lawsuit in the court of the United States of America shall not affect the independent jurisdiction over this case as enjoyed by the court of the People's Republic of China. In conclusion, the reason for the appellant Malaysia International Shipping Corporation Berhad to lodge the appeal cannot be established and shall not be supported by this court. Pursuant to Article 152, Article 158 of *Civil Procedure Law of the People's Republic of China*, the decision is made as follows:

The appeal is rejected and the first instance decision shall be maintained.

The court fee of the second instance is RMB 50 to be born by Malaysia International Shipping Corporation Berhad.

This decision is the final decision.

Presiding Judge: Shi Shi

Judge: Liu Meng Lang

Deputy Judge: Zhou Lan Ying

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(4)

No. 06-102

IN THE

# Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

*Petitioner*,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

A divided panel of the Court of Appeals for the Third Circuit held that a district court must first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of *forum non conveniens*. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an already-existing 2-4 split among the circuits, and invited this Court's review.

The question presented is:

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

There is no parent company or publicly held company owning 10% or more of Petitioner's stock.

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## BRIEF FOR PETITIONER

The complaint in this case alleges misconduct committed by one non-U.S. entity (Sinochem, a Chinese company) against another non-U.S. entity (MISC, a Malaysian company). Most of the relevant acts occurred in China, and most of the relevant witnesses and documents are located there. The dispute is being adjudicated in China, where China's courts have conclusively determined that they have jurisdiction over the action initiated there by Sinochem. In the parallel action filed by MISC in federal district court, the district court concluded that it had subject-matter jurisdiction over the action, but was unable to determine without discovery whether it had personal jurisdiction over the defendant, Sinochem. Even so, the court dismissed the suit on *forum non conveniens* grounds.

A divided panel of the Third Circuit vacated the judgment of dismissal and remanded for the district court to first establish conclusively whether it has personal jurisdiction over Sinochem before reaching the *forum non conveniens* issue. That decision was contrary to this Court's precedents allowing dismissal of actions on threshold non-merits grounds, and to this Court's precedents treating dismissals such as *forum non conveniens* dismissals as precisely this sort of threshold, non-merits issue. Moreover, as the Third Circuit itself recognized, the rule embraced by its decision creates multiple inefficiencies, and it is also contrary to the norms of international comity. That court's judgment should be reversed.

## OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Pennsylvania was issued on February 27, 2004, and is available at 2004 WL 503541 (E.D. Pa.) (Pet. App. 48a-69a). The subsequent opinion of that court, denying MISC's motion for reconsideration, was issued on April 13, 2004, and is available at 2004 WL 825466 (E.D. Pa.) (Pet. App. 37a-47a).

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006, and is reported at 436 F.3d 349 (Pet. App. 3a-36a). The Third Circuit's order denying rehearing and rehearing *en banc* is unreported (Pet. App. 1a-2a). This Court's order granting certiorari is reprinted in the Joint Appendix (J.A. 15).

## JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006. Pet. App. 3a-36a. The Court of Appeals' order denying Sinochem's petition for rehearing *en banc* was issued on March 23, 2006. Pet. App. 1a-2a. On June 6, 2006, Petitioner timely filed an application to extend the time to file a petition for certiorari from June 21, 2006, to July 21, 2006. On June 8, 2006, Justice Souter granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution and Rule 4(k)(2) of the Federal Rules of Civil Procedure, which are set out in full in the Appendix to the Petition for Certiorari. Pet. App. 70a-71a.

## STATEMENT OF THE CASE

### A. Background

This is a dispute about the shipping of steel coils to China. In 2003, Petitioner Sinochem, a Chinese company, contracted with Triorient Trading Inc., an American company not a party to this action, for the sale of steel coils. Pursuant to that contract, a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law. Pet. App. 37a-38a, 49a.

The steel coils were loaded in Philadelphia onto a vessel owned by Respondent MISC, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA), ch. 229, § 1, 49 Stat. 1207 (1936).[1] Pet. App. 38a, 49a.

**B. The Parallel Chinese and Federal District Court Proceedings**

*1. The filing of the Chinese action.* On June 8, 2003, Sinochem filed a petition for preservation of a maritime claim in the Guangzhou Admiralty Court; in response to Sinochem's petition, the court ordered the ship arrested. Upon its arrival at the Chinese port, MISC's vessel carrying Sinochem's cargo was in fact arrested by order of the Admiralty Court. The arrest was based on an allegation that MISC had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, MISC posted a U.S. $9,000,000 security bond to obtain release of its vessel. Pet. App. 38a, 50a. On July 2, 2003, Sinochem timely perfected its petition for preservation by filing a complaint in the Chinese

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[1] This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean, the carrier, regarding the vessel. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 4-1, at 193 (2d ed. 1975). The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York arbitration with U.S. law" to apply to disputes under it. An opinion of the Chinese court in the related proceeding, however, stated that English law governed disputes under the charter party. Pet. App. 38a n.2, 66a.

Admiralty Court, alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading. Pet. App. 50a.

*2. The filing of the U.S. action.* While the Chinese action was pending—*i.e.*, after Sinochem had filed its petition for preservation of a maritime claim—MISC filed this suit in the United States on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the vessel's arrest, it negligently misrepresented "the vessel's fitness and suitability to load its cargo." Pet. App. 39a (internal quotation marks omitted). Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and for "failure to observe the rules of [international] comity." Pet. App. 48a, 51a.

*3. The rejection of MISC's jurisdictional challenge in China.* After filing the U.S. action, MISC challenged the jurisdiction of the Chinese courts to entertain Sinochem's Complaint. The Admiralty Court rejected that challenge; MISC appealed that rejection; and, on February 27, 2004, the Guangdong Higher People's Court (the "Chinese High Court") affirmed, concluding that the Chinese Admiralty Court had jurisdiction over the dispute. Pet. App. 6a. Specifically, the Chinese High Court rejected MISC's argument that the choice-of-law provisions contained in the bill of lading and charter party controlled the case and compelled the location of jurisdiction in the London Maritime Arbitration Commission. Pet. App. 6a. That judgment was not further appealable. Pet. App. 6a n.6.

*4. The dismissal of the federal district court action.* In the United States, the district court, on March 1, 2004, granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration of that ruling. The court determined that it had subject-matter jurisdiction over MISC's action pursuant to admiralty and maritime jurisdiction, *see* 28 U.S.C. § 1333(1), because the alleged

tort, the seizure of the vessel at a port in China, occurred on navigable waters, and because the incident had a sufficient connection to maritime activity. Pet. App. 9a-15a.

As to personal jurisdiction, the court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. Pet. App. 55a-59a. However, the court stated that "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute," should the assertion of such jurisdiction be consistent with Sinochem's due process rights. Pet. App. 59a. The court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*. Pet. App. 60a, 67a.

In dismissing on the ground of *forum non conveniens*, the district court noted, without any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent-misrepresentation claim existed in the Chinese Admiralty Court. Pet. App. 67a-68a. The district court concluded that the "private interest" factors of the *forum non conveniens* determination, such as ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses, pointed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless of whether MISC's action continued in the United States. Pet. App. 64a, 68a.

The district court also observed that the "public interest" factor, the avoidance of unnecessary conflict-of-laws problems, also favored dismissal because Chinese law would apply to MISC's claim that Sinochem made negligent misrepresentations to the Chinese Admiralty Court. Pet. App. 65a-66a. Furthermore, as no United States interests were implicated, the court held that dismissal for *forum non conveniens* was appropriate despite the deference that must

be paid to the plaintiff's (in this case MISC's) choice of forum. Pet. App. 67a. The district court subsequently issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. Pet. App. 37a-47a.

**C. The Court of Appeals' Decision**

A divided panel of the Court of Appeals for the Third Circuit affirmed the finding of admiralty jurisdiction, but concluded that the district court improperly decided the *forum non conveniens* motion prior to ascertaining whether it had personal jurisdiction over Sinochem. The panel majority, Judges Ambro and Alarcon (Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation), concluded that, while *forum non conveniens* is a non-merits ground for dismissal, the district court nonetheless should have determined whether personal jurisdiction existed prior to dismissing on *forum non conveniens* grounds because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction . . . and venue." Pet. App. 21a. The majority acknowledged that "Courts of Appeals have split on the issue," and chose the rule adopted by the Fifth, Seventh, and Ninth Circuits, while rejecting the rule that governs in the Courts of Appeals for the Second and D.C. Circuits. Pet. App. 16a-17a.

The majority candidly recognized that its decision "may not seem to comport with the general interests of judicial economy," and that it reached its decision not "without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." Pet. App. 26a. Believing itself bound by precedent, however, the majority invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." Pet. App. 26a.

Judge Stapleton filed a dissenting opinion, observing that the court would "make[] no assumption of law declaring power" by deciding not to exercise whatever jurisdiction it may have, and therefore dismissal on *forum non conveniens*

grounds without first determining its own jurisdiction is proper. Pet. App. 36a (internal quotation marks omitted). Judge Stapleton also noted that the majority's decision "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." Pet. App. 33a.

Sinochem petitioned for rehearing *en banc*, which was denied. Pet. App. 1a-2a. On September 26, 2006, this Court granted Sinochem's petition for certiorari. J.A. 15.

## SUMMARY OF THE ARGUMENT

The Court should reverse the judgment of the Court of Appeals for the Third Circuit for the following reasons:

*First*, the Third Circuit's decision is contrary to this Court's case law. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), establish the impropriety of the previously longstanding practice, followed by some lower courts, of assuming (without deciding) its subject-matter and personal jurisdiction over an action in order to dismiss a case on the merits. But this bar on "hypothetical jurisdiction" is only a bar on deciding the merits of a dispute without first ascertaining the court's power to decide those merits. The rule of *Steel Co.* does not forbid the practice of dismissing suits on dispositive *non-merits* grounds which, although not "jurisdictional" in the narrowest sense of that term, are nonetheless "threshold grounds for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585.

Indeed, this Court's case law, both before and after *Steel Co.* and *Ruhrgas*, has repeatedly endorsed the practice of dismissing on threshold non-merits grounds that are not, in the narrow sense, "jurisdictional." In *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court approved the discretionary practice of declining to exercise pendent jurisdiction before ascertaining that jurisdiction. In *Ellis v.*

*Dyson*, 421 U.S. 426, 436 (1975), the Court approved of courts abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), before determining whether there was a "case or controversy." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999), the Court similarly considered Rule 23 certification issues related to statutory standing prior to considering the plaintiffs' Article III standing. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000), decided after *Steel Co.* and *Ruhrgas*, the Court considered whether a statute permits a cause of action before considering the jurisdictional question of Eleventh Amendment immunity. In *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004), the Court approved of dismissing a case on prudential standing grounds before reaching the question of Article III standing. And in *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005), the Court considered the public-policy bar of *Totten v. United States*, 92 U.S. 105 (1875), to be "the sort of 'threshold question' [that] may be resolved before addressing jurisdiction."

These cases reflect the repeated application of a simple rule: Dispositive issues that deny a federal-court audience to the merits of a case, even if not considered to be "jurisdictional" in the narrow sense of that term, may nonetheless be decided at the outset of a case.

It matters not that the "threshold groun[d] for denying the audience on the merits" is grounded, as here, on a doctrine that calls for the exercise of judicial discretion. Certainly, abstention doctrines, as in *Younger*, or prudential-standing doctrines, as in *Kowalski*, are discretionary in nature, yet deciding to abstain or dismiss on prudential grounds prior to ascertaining subject-matter and personal jurisdiction is in perfect accord with *Steel Co.* and *Ruhrgas*.

*Forum non conveniens* is a classic example of a threshold non-merits ground for dismissal. "[A] court that dismisses on other non-merits grounds such as *forum non conveniens* . . ., before finding subject-matter jurisdiction, makes no

assumption of law-declaring power that violates the separation of powers principles." *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998) (quoted with approval in *Ruhrgas*, 526 U.S. at 584-85), *superseded by statute on other grounds*. "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), *superseded by statute on other grounds*.

This Court has labeled *forum non conveniens* "a supervening venue provision," *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), and has observed in several cases that a *forum non conveniens* decision is not a ruling on the merits, as it does not bear on the substantive right to recover, *id.* at 454; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988). Consistent with this view, this Court has itself decided a venue question antecedent to resolving questions of personal jurisdiction. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-81 (1979). In sum, *forum non conveniens* is a non-merits ground for dismissal that may be considered at the outset, before subject-matter and personal jurisdiction are conclusively established, without running afoul of the *Steel Co.* bar on "hypothetical jurisdiction."

*Second*, *forum non conveniens* is particularly apt for consideration at the outset of a case. For one, the public and private factors of the *forum non conveniens* determination, as well as international comity considerations, counsel against the rule adopted by the Third Circuit. That rule would require foreign defendants such as Sinochem to be subjected to jurisdictional litigation, including potentially expensive, burdensome, and time-consuming discovery in United States courts, despite the dispute being so patently unconnected to the United States that a *forum non conveniens* dismissal is appropriate in the first instance.

For another, the approach taken by the Third Circuit is wildly inefficient. Both the majority and the dissenting judge below agreed that its decision did not "comport with the general interests of judicial economy." Pet. App. 26a; *see also* Pet. App. 34a.

Finally, the Court of Appeals' opinion is inconsistent with the principle of constitutional avoidance, which was one of the justifications for the rule of discretion adopted in *Ruhrgas*. In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates potentially significant due process issues under the Fifth Amendment. Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional, non-merits ground for decision, it is therefore more consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery and subsequent litigation, whether the court has personal jurisdiction over Sinochem consistent with the Due Process Clause. This course of action would avoid federal court entanglement in difficult constitutional questions, whose resolution in these circumstances would be purely advisory.

## ARGUMENT

### I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S PRECEDENTS

#### A. The Bar On "Hypothetical Jurisdiction" Only Prohibits Courts From Granting An Audience On The Merits Prior To Ascertaining Jurisdiction; It Does Not Prohibit Dismissals On Threshold, Non-Merits Grounds

No one can seriously dispute the principle that a court should not reach the merits of a case if it does not have jurisdiction. To do so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). At the same time,

however, the term "jurisdiction" is notoriously generalized—it may refer to any number of concepts (including, but scarcely limited to, "subject-matter" jurisdiction and "personal" jurisdiction). "'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings . . . .'" *Id.* at 90 (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). *See also Cross-Sound Ferry Servs. Inc. v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of rehearing) (referring to the "woolliness of the concept" of determining what issues are "jurisdictional"), *abrogated by Steel Co.*, 523 U.S. 83; *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988) (Breyer, J.) ("recogniz[ing] the protean quality of the word 'jurisdiction'"). But at the most basic level, "jurisdiction" refers to a court's authority to decide the merits of the dispute that is brought before it. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'") (quoting *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

That is what the Court's bar on the exercise of "hypothetical jurisdiction" means, no more and no less: A federal court may not assume it has power and then go on to decide the merits of a dispute. But it does not follow from this rule that federal courts are prohibited from declining that power in the first instance, as the district court in this case did. The Third Circuit, in reversing the district court, erroneously viewed the bar on "hypothetical jurisdiction" as an inflexible rule requiring that "jurisdiction" (which it understood as referring only to subject-matter and personal jurisdiction) must always be decided first. This Court's decisions hold otherwise.

Prior to the Court's 1998 decision in *Steel Co.*, some lower courts would skip the step of ascertaining their own jurisdiction in order to dismiss a case on the merits. As one Court of Appeals described the practice, "[w]hen the merits

of the case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching the jurisdictional contention." *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996). It was this practice of leaping to the merits, referred to as "assumed" or "hypothetical" jurisdiction, that this Court halted in *Steel Co.*, 523 U.S. 83.

There, the Court explicitly repudiated the "practice . . . [of] 'assuming' jurisdiction for the purpose of deciding the merits." *Id.* at 94 (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The Court "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers," and held that disputes over Article III jurisdiction (such as constitutional standing) must be resolved before deciding the merits, *id.*, lest the federal courts "act *ultra vires*." *Id.* at 102.

The Court nonetheless noted that a number of its prior cases had allowed dismissals on *non-merits grounds* reached before deciding issues of subject-matter or personal jurisdiction. Citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court observed that in that case, "we declined to decide whether a federal court's pendent jurisdiction extended to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction." *Steel Co.*, 523 U.S. at 100 n.3. The Court also cited *Ellis v. Dyson*, 421 U.S. 426, 436 (1975), noting that "the authoritative ground of decision" upon which the District Court had relied was *Younger* abstention, which has been treated as jurisdictional, rather than determining first whether there was a "case or controversy." *Steel Co.*, 523 U.S. at 100 n.3 (internal quotation marks omitted). The Court further acknowledged

that statutory standing questions can be given priority over questions of Article III jurisdiction. *Id.* at 97 n.2.

Thus, while rejecting "hypothetical jurisdiction," the Court also rejected the notion that "jurisdiction" must always be decided first. The Court's opinion noted that these prior decisions "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* at 101. *See also id.* at 111 (Breyer, J., concurring) ("The Constitution does not impose a rigid judicial 'order of operations' when doing so would cause serious practical problems.").

Following *Steel Co.*, the Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), elaborated on *Steel Co.*'s distinction between jurisdictional and merits questions. It held that "there is no unyielding jurisdictional hierarchy" between questions of subject-matter and personal jurisdiction. *Id.* at 578. Thus, *Ruhrgas* established that courts are not obligated to resolve subject-matter jurisdiction before personal jurisdiction, particularly where a "defect in subject-matter jurisdiction raises a difficult and novel question," and personal jurisdiction is "straightforward" and presents "no complex question[s]." *Id.* at 588. The Court reaffirmed *Steel Co.*'s central holding that it is permissible to select among non-merits bases for dismissal at the outset of a case: "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585 (citing *Moor*, 411 U.S. 693, and *Ellis*, 421 U.S. 426). Quoting approvingly from the D.C. Circuit opinion in *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)—with which the Third Circuit in this case explicitly disagreed (*see* Pet. App. 25a-26a)—this Court posited that "'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (ellipses in *Ruhrgas*). Notably, the full quote in *Papandreou* refers to "non-merits grounds such as

*forum non conveniens* and personal jurisdiction . . . ." 139 F.3d at 255.

Since its decisions in *Steel Co.* and *Ruhrgas*, the Court has continued to follow (and endorse) the practice of dismissing on threshold non-merits grounds that are not, rigorously speaking, "jurisdictional." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court held that Rule 23 certification issues "themselves pertain to statutory standing, which may be properly treated before Article III standing." *Id.* at 831 (citing *Steel Co.*, 523 U.S. at 92).

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court approved of what it described as the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before addressing "whether the Eleventh Amendment forbids [the] statutory cause of action." *Id.* at 779 (emphasis in original). The Court endorsed this practice as consistent with *Steel Co.* because there was no risk of the courts acting *ultra vires*: "[T]here is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id.*

In *Kowalski v. Tesmer*, 543 U.S. 125 (2004), the Court faced a challenge, brought by attorneys, to the constitutionality of Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty. Before reaching the merits, the Court asked whether the plaintiff attorneys, who invoked the rights of "hypothetical indigents," had standing to bring these claims. Citing *Ruhrgas*, the Court "assume[d], without deciding" that the attorneys' allegations of Article III "injury in fact" "are sufficient." *Id.* at 129 n.2. Having assumed the existence of Article III standing, the Court then addressed the "alternative threshold question" of whether the prudential standing requirements were satisfied. *Id.* at 129. The Court ultimately concluded that the attorneys did not have third-

party standing. *Id.* at 134. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (dismissing on the ground of prudential standing, "which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction'") (citation omitted).

Most recently, this Court held that it could consider whether a suit by former spies must be dismissed under the public-policy bar of *Totten v. United States*, 92 U.S. 105 (1875), which prohibits suits against the government based on covert espionage agreements, prior to ruling on the government's jurisdictional objection. *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). In moving to dismiss in the lower courts, the government argued that the Tucker Act requires such a suit to be filed in the Court of Federal Claims, rather than in a district court; the Government did not petition for certiorari on that question. *Id.* The Court explained that it "may assume for purposes of argument that this Tucker Act question is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim." *Id.* The Court then held that "application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger v. Harris*, or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." *Id.* (internal citation omitted).

The need for this flexibility was grounded in the reasons behind the *Totten* bar itself: "[T]o first allow discovery or other proceedings in order to resolve the jurisdictional question," "would be inconsistent" with the purpose of the *Totten* bar—"to defeat the asserted claims [and] to preclude judicial inquiry." *Id.* Thus; "whether or not the Government was permitted to waive the Tucker Act-question, we may dismiss respondents' cause of action on the ground that it is barred by *Totten*." *Id.*

All of these cases reflect the repeated application of a simple rule: Dispositive issues that deny a federal-court

audience to the merits of a case, even if not considered to be "jurisdictional" in the narrow sense of that term, may nonetheless be decided at the outset of a case. That statement of the rule is a clear one that can easily be applied by lower federal courts, and it allows courts the flexibility of dismissing cases that should not gain entry to the federal system on any number of grounds not traditionally styled as "jurisdictional" grounds—while simultaneously avoiding any possibility of a federal court acting *ultra vires* or issuing advisory opinions, which was the Court's central concern in *Steel Co.*[2]

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[2] Although not addressed by the Third Circuit, *dicta* in some of this Court's prior decisions create the appearance of a "broken circle" in this area. *See* Pet. at 11 n.2 (quoting *Steel Co.*, 523 U.S. at 97 n.2). That is, there is some tension between *Ruhrgas*'s holding (allowing threshold dismissals on personal-jurisdiction rather than subject-matter jurisdiction grounds) and this Court's *dicta,* suggesting that subject-matter jurisdiction has a primacy over such issues as personal jurisdiction and venue. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 950-51 (2006). The Court may wish to clarify in its decision that there is, in fact, no "broken circle" in this area.

*Wachovia* was a statutory-construction case. There, the Court was interpreting 28 U.S.C. § 1348, which provides that, for *diversity-jurisdiction* purposes, national banks "shall . . . be deemed citizens of the States in which they are respectively located." The Court held that a national bank is "located" in the state designated in its articles of association as the locus of its main office, and it distinguished *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977), which had interpreted the former *venue* statute for national banks as encompassing any county in which a branch office of a national bank is "located." The Court explained its distinction on the ground that "located" has no fixed meaning and may properly vary for subject-matter and venue purposes in view of the differences between the two concepts: "[V]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience. . . . Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases." *Wachovia*, 126 S. Ct. at 950-51 (internal citations omitted).

### B. Discretionary Barriers To Federal Court May Be Decided At The Outset

Numerous doctrines are not, rigorously speaking, "jurisdictional," yet they play much the same role as do jurisdictional rules—like a finding of no jurisdiction, these doctrines abjure the federal courts' power to decide the merits of a dispute at the outset. Many of them, in fact, are discretionary or prudential. They, too, can be decided at the outset without offending the basic prohibition on "hypothetical jurisdiction," as none of these doctrines poses any risk that the federal courts will render pronouncements that are *ultra vires* and thus strictly advisory.

To begin, this Court stated unequivocally in *Steel Co.* that the bar on "hypothetical jurisdiction" does not prohibit threshold decisions on "*discretionary* jurisdictional question[s]." 523 U.S. at 100 n.3 (emphasis added). In fact, the Court in *Steel Co.* and *Ruhrgas* relied on cases addressing discretionary barriers to federal court prior to Article III jurisdiction to demonstrate the limits of the bar.

*Younger* abstention is a classic discretionary doctrine, grounded as it is in fundamental principles of equity. *See Younger v. Harris*, 401 U.S. 37, 44-46 (1971). This Court has made clear that *Younger* abstention is one of those threshold barriers to federal-court entry that may properly be decided before ascertaining jurisdiction. In *Ellis*, the Court bypassed the question of whether there was a "case or controversy," in favor of the exercise of discretion to abstain

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Of course, that distinction between subject-matter jurisdiction and venue is an accurate one, but it does not follow from this accurate statement that *only* jurisdictional issues may be considered as "threshold, non-merits issues" under *Ruhrgas*. Nor did *Wachovia* say anything about the order in which such issues must be decided; indeed, neither the Court in *Wachovia* nor the parties in their briefing cited either *Steel Co.* or *Ruhrgas*. There is no conflict between *Wachovia* and the rule proposed here.

under *Younger*. 421 U.S. at 436. *See Tenet*, 544 U.S. at 6 n.4; *see also Steel Co.*, 523 U.S. at 100 n.3; *Ruhrgas*, 526 U.S. at 585. Other abstention doctrines, too, may be considered before "jurisdictional" issues without running afoul of *Steel Co.*'s bar on hypothetical jurisdiction.[3]

Pendent jurisdiction (now known as supplemental jurisdiction, *see* 28 U.S.C. § 1367) may be declined as a matter of judicial discretion. *See, e.g., Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006); 28 U.S.C. § 1367(c). In *Moor*, the Court bypassed the question of whether a federal court could assert pendent jurisdiction over state-law claims against a new party, in favor of the exercise of discretion in declining pendent jurisdiction. 411 U.S. at 715-16. *See Steel Co.*, 523 U.S. at 100 n.3; *Ruhrgas*, 526 U.S. at 585; *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites"); 28 U.S.C. § 2201(a).

Similarly, questions of improper venue are committed to the discretion of the district court. *See American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981)); 28 U.S.C. § 1404(a). As noted, this Court in *Leroy v. Great W. United*

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[3] *See, e.g., Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006) (relying on this Court's characterization of *Younger* abstention as a "threshold question" that "may be resolved before addressing jurisdiction" to hold that it was not necessary to decide subject-matter jurisdiction before dismissing the case as presenting a nonjusticiable political question) (internal quotation marks omitted); *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 66 & n.1 (1st Cir. 2002) (relying on *Steel Co.* to affirm the bankruptcy court's decision to exercise its discretion to abstain under 28 U.S.C. § 1334(c)(1), without first resolving subject-matter jurisdiction question).

*Corp.*, 443 U.S. 173 (1979), approved of dismissing a case for improper venue prior to ascertaining the existence of personal jurisdiction. *Id.* at 180.

Finally, whether a plaintiff or set of plaintiffs in a putative class action has satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure is considered a discretionary ruling. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185 (1974). In *Ortiz*, as noted, the Court considered Rule 23's requirements (which it said "pertain to statutory standing") prior to considering the question of Article III jurisdiction. 527 U.S. at 831 (citing *Steel Co.*, 523 U.S. at 92).

The discretionary nature of these gatekeeping doctrines thus has no bearing on the issue before this Court. Consistent with *Steel Co.*, its ancestors, and its progeny, such discretionary doctrines may be employed at the outset of a case to deny a federal-court audience to the merits, because "'a court that dismisses on . . . non-merits grounds . . . makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (quoting *Papandreou*, 139 F.3d at 255). Indeed, this Court's cases already demarcate this boundary between "threshold grounds for denying audience to a case on the merits" and the merits inquiry. *Ruhrgas*, 526 U.S. at 585. *See also Tenet v. Doe*, 544 U.S. at 12 (Scalia, J., concurring) (emphasizing that the *Totten* rule of dismissal, which is "the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction, is . . . not referring to the run-of-the-mill, nonthreshold *merits* question whether a cause of action exists") (quoting *id.* at 6 n.4) (emphasis in original).

The line between "denying the audience on the merits" and the merits inquiry is relatively clear, and relatively easy to apply. Courts are well-equipped to determine, based on the claims and defenses asserted in the pleadings, whether a ruling is a "merits" ruling or not; courts certainly have

experience in drawing that line when applying *res judicata* and collateral estoppel. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988) (holding that a state court's failure to follow a prior *forum non conveniens* ruling did not merit an injunction under the relitigation exception of the Anti-Injunction Act because it "did not resolve the merits"). The line also has pragmatic force, in that courts can adapt its application to fit the circumstances of a given case, and can choose among threshold non-merits issues to dismiss a case based on considerations of ease, practicality, efficiency, or constitutional avoidance. Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 269-70 (2000) (endorsing a pragmatic approach to threshold dismissals over "rigidly applied rules of procedure"); *see generally id.* at 269 ("Our courts need to be practical and efficient if they are to carry out their mission of serving the citizenry. . . . One can find within the accepted power of a court to determine its subject-matter jurisdiction, the ability to decide whether it can dismiss cases on preliminary grounds when such dismissals will save time, energy and cost.").[4]

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[4] In addition, allowing federal courts to bypass jurisdictional issues in favor of procedural issues may have the collateral but still salutary benefit of engendering respect for court orders entered prior to a conclusive determination of a court's jurisdiction. *See* Joan Steinman, *After* Steel Co.: *"Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 872 (2001) (explaining that, for practical reasons, a court should be allowed to make procedural rulings relating to jurisdiction prior to ascertaining jurisdiction: "A court may need to enter orders regarding pleadings and discovery before it can make a well-grounded determination as to whether subject-matter (or personal) jurisdiction exists. It may appropriately impose sanctions if such discovery orders are disobeyed."); *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (court can impose sanctions under Fed. R. Civ. P. 11 even though it lacks subject-matter jurisdiction because such action "'does not signify a district court's assessment of the legal merits of the complaint'") (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)).

In all of these cases, the Court approved dismissals on discretionary threshold grounds without reaching questions of "jurisdiction" (understood, as the Third Circuit did, in the narrow sense of subject-matter and personal jurisdiction). This illustrates the central flaw in the Court of Appeals' reasoning. The Third Circuit believed that the *Ruhrgas* rule does not apply because "a court following *Ruhrgas* can dismiss with certainty that the case is not properly before it." Pet. App. 32a. By contrast, the Third Circuit reasoned that "[a] case dismissed for *forum non conveniens* . . . is not faulty—by definition. It is a case properly before the court to determine the merits, although it is simply more convenient to do so elsewhere." Pet. App. 32a. That analysis is flatly inconsistent with the Court's treatment of abstention and other similar discretionary doctrines that deny a federal-court audience to claims at the outset of litigation. If the Third Circuit's expansive view of the ban on hypothetical jurisdiction were correct, all of these cases would, as a matter of necessity, have been decided differently.

### C. *Forum Non Conveniens*, Like These Other Discretionary Bars To Consideration Of The Merits, May Also Be Decided At The Outset

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The district court's dismissal of MISC's complaint, which "resist[ed] imposition upon its jurisdiction," represented a proper threshold non-merits ground for denying an audience to a case on the merits. It was not, as the Third Circuit suggested, an *ultra vires* act.

To begin, this Court in *Ruhrgas* quoted—with approval—the D.C. Circuit's opinion in *Papandreou*, 139 F.3d at 255. This Court held, quoting *Papandreou*, that "'a court that dismisses on other non-merits grounds such as . . . personal

jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles.'" *Ruhrgas*, 526 U.S. at 584-85 (ellipses in *Ruhrgas*). As noted above, the full quote from *Papandreou* states that "a court that dismisses on . . . non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles." 139 F.3d at 255. And indeed, that statement is just as true with respect to the doctrine of *forum non conveniens* as it is with respect to personal jurisdiction, or improper venue, or abstention, or any of the other non-merits threshold issues that allow a federal court to dismiss a suit and avoid the merits of a dispute: No "assumption of law-declaring power" is made when the court abjures jurisdiction before deciding whether such jurisdiction exists.

Three of this Court's decisions—*Am. Dredging Co.*, 510 U.S. 443, *Leroy*, 443 U.S. 173, and *Chick Kam Choo*, 486 U.S. 140—compel the conclusion that the Third Circuit was wrong to view *forum non conveniens* otherwise. Taken together, these three cases demonstrate that *forum non conveniens* is precisely one of those "threshold grounds for denying audience to a case on the merits," *Ruhrgas*, 526 U.S. at 585.

In *American Dredging*, this Court observed: "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." 510 U.S. at 453; *see also Gulf Oil Corp.*, 330 U.S. at 507 (noting that the discretionary aspect of the doctrine allows courts to refuse a suit in a formally authorized venue). The Court in *American Dredging* emphatically stated that "the [*forum non conveniens*] doctrine is one of procedure rather than substance," 510 U.S. at 453, because it "does not bear upon the substantive right

to recover, and is not a rule upon which . . . actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." *Id.* at 454.

Viewing *forum non conveniens* as a "supervening venue provision," then, *Leroy* establishes that it is appropriate to resolve questions of venue prior to addressing personal jurisdiction: "Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the [original judicial district]." 443 U.S. at 180. The Court explained that the "question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Id.* But, "when there is a sound prudential justification for doing so, . . . *a court may reverse the normal order of considering personal jurisdiction and venue*." *Id.* (emphasis added). This flexibility is allowed because "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties." *Id.*

Finally, like *American Dredging*, 510 U.S. at 453-54, this Court's decision in *Chick Kam Choo*, 486 U.S. 140, demonstrates that *forum non conveniens* dismissals do not "resolve the merits" of a complaint. There, the Court addressed whether the Anti-Injunction Act's relitigation exception, "founded in the well-recognized concepts of *res judicata* and collateral estoppel," allowed a federal court to enjoin a subsequent proceeding brought in Texas state court to enforce the federal dismissal on *forum non conveniens* grounds. *Id.* at 148. Petitioner argued that the federal court had adjudicated the merits of her claim and thus, the federal court's judgment had preclusive effect. *Id.* The Court, however, held that the relitigation exception did not apply because "[t]he District Court did not resolve the merits of

[petitioner's] claim . . . . Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine." *Id.* Thus, *Chick Kam Choo*—like *American Dredging*—plainly establishes that *forum non conveniens* is a non-merits issue, properly utilized to deny audience to a case on the merits.[5]

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[5] The same Term that the Court decided *Chick Kam Choo*, the Court also held that a denial of a *forum non conveniens* motion does not fall within the collateral-order doctrine, in part because "in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988). However, as the Third Circuit itself noted, *Biard* does not establish that *forum non conveniens* is a "merits" issue because of this Court's decision in *Chick Kam Choo*, and because any entanglement in the merits is necessarily minimal; "[n]othing in *Biard* directs a court to assess the relative strength of the parties' arguments and to select one paramount issue." Pet. App. 20a (internal quotation marks and alterations omitted). Furthermore, in making this comment, *Biard* was addressing a specific aspect of the collateral-order doctrine, the "separate and collateral" requirement, which seeks to avoid "repetitive appellate review of substantive questions in the case." 486 U.S. at 528.

Of course, there is no risk of "repetitive appellate review" of the merits after a *grant* of a *forum non conveniens* motion, which is the case here. And, in an appropriate case, a district court can exercise its discretion to deny a motion to dismiss if it determines that the *forum non conveniens* motion would be better informed by further consideration of jurisdictional (or even merits) issues. But, in all events, if a *complete* separation from merits were a prerequisite for dismissing the suit before ascertaining jurisdiction, then *Ruhrgas* would have been decided differently. After all, ascertaining personal jurisdiction requires an inquiry into the defendant's contacts with the forum and relationship of those contacts to the plaintiff's injury, *see, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), which, in turn, requires at least some examination of the allegations of the complaint. *See generally* David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 FORDHAM L. REV. 3147, 3180-84 (2006) (urging that *forum non conveniens* is not a merits inquiry and does not require antecedent confirmation of jurisdiction).

The Third Circuit purported to agree that *forum non conveniens* is a non-merits issue. Yet it still concluded that personal jurisdiction had to be conclusively verified before a *forum non conveniens* dismissal could lie. The Court of Appeals relied in part on *Gulf Oil Corp.*, 330 U.S. 501, for this conclusion. Pet. App. 21a-22a. In *Gulf Oil*, the Court enumerated the criteria for applying *forum non conveniens* and noted in passing that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507. Of course, *Gulf Oil* did not involve the issue of (and therefore did not address) the order in which to resolve preliminary, non-merits challenges, and so its "even when jurisdiction is authorized" language cannot reasonably be read as *requiring* jurisdiction to be conclusively and inflexibly established first. Any such reading of *Gulf Oil*, moreover, would be inconsistent with the Court's more-recent cases, such as *American Dredging*, *Leroy*, *Steel Co.*, *Ruhrgas*, and multiple other decisions holding that a court may indeed choose to decide threshold, non-merits issues before deciding whether it has jurisdiction. *See also, e.g.*, *Moor*, 411 U.S. 693; *Ellis*, 421 U.S. 426.[6]

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[6] In concluding otherwise, the Third Circuit adopted the nomenclature of a law-review article, which posited three categories of issues: "jurisdictional," "merits," and issues that "fit[] somewhere between" pure jurisdictional issues and pure merits issues. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 321-22 (1999). The Third Circuit reasoned that *forum non conveniens* belongs to this new "third category." Pet. App. 18a.

That conclusion was untenable for multiple reasons. *First*, nothing in this Court's jurisprudence suggests *these* three categories, or even three categories at all. Rather, as explained in Part I(A), above, the relevant categories are two—"merits" issues, on the one hand, and "threshold issues that deny an audience on the merits," on the other. The latter can

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In sum, *forum non conveniens* is a non-merits ground for dismissal that may be considered at the outset, before subject-matter and personal jurisdiction are conclusively established, without running afoul of the *Steel Co.* bar on "hypothetical jurisdiction." Indeed, *forum non conveniens* might well be considered "jurisdictional" in a broader sense of the term: Although it is judge-made doctrine with a long common-law lineage, it does regulate entry to federal courts, and it possesses what the late Chief Justice Rehnquist called "the most salient characteristic of jurisdictional statutes"—

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be "jurisdictional" (however that term is defined) or not, discretionary or non-discretionary.

*Second*, the Court of Appeals ignored the conclusion reached by Professor Idleman's article, which appears just one page after the analysis upon which the Court of Appeals relied, that it is *appropriate* for a federal court to dismiss on his "third category" grounds (including, presumably, *forum non conveniens*) prior to determining jurisdiction:

> [T]hese ["third category"] issues could also theoretically be reached in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although [it] would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

Idleman, *supra*, at 323. The article's analysis is entirely consistent with the analysis in *Papandreou*, on which this Court relied in *Ruhrgas*, and the article so recognizes. *Id.* at 332, 336. The Third Circuit, however, chose to ignore Professor Idleman's analysis of this point.

*Finally*, in a later article, penned after *Ruhrgas* was decided, Professor Idleman, while questioning the correctness of *Ruhrgas*, acknowledged that "nothing in *Ruhrgas* suggests the contrary—. . . courts may resequence threshold inquiries other than personal jurisdiction prior to subject-matter jurisdiction." Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 4 (2001).

"its commands are addressed to courts rather than individuals." *Lindh v. Murphy*, 521 U.S. 320, 344 (1997) (dissenting opinion).

## II. *FORUM NON CONVENIENS* IS PARTICULARLY APT FOR CONSIDERATION AT THE OUTSET OF A CASE

In addition to being compelled by this Court's decisions, reversal of the judgment of the Third Circuit would serve important ends.

### A. Foreign Defendants Ought Not Be Subjected To Discovery And Jurisdictional Litigation Where The United States Is Obviously An Inappropriate Forum

The rule embraced by the Third Circuit would require foreign defendants such as Sinochem to be subjected to jurisdictional litigation, including potentially expensive, burdensome, and time-consuming discovery in United States courts, despite the fact that the dispute is so patently unconnected to the United States that a *forum non conveniens* dismissal is appropriate at the outset of the case. The rule endorsed by Sinochem, however, would allow federal courts to avoid this basic burden on litigants and courts.

Indeed, that is the central concern of the public- and private-interest factors to be considered in applying the *forum non conveniens* doctrine. After establishing that there is an existing alternative forum in a foreign country,[7] a court

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[7] There is no issue here as to the absence of an alternative forum, a key element of a number of the *forum non conveniens* cases on which the majority in the Court of Appeals relied. *See, e.g.*, Pet. App. 23a ("[T]he Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone [, Inc.]*, 420 F.3d [702,] 705 [(7th Cir. 2005)]."). Here, however, the district court found, and the

will consider "the private interest of the litigant." *Am. Dredging Co.*, 510 U.S. at 448 (internal quotation marks omitted). At its essence, this private interest is in making the "trial of a case easy, expeditious and inexpensive." *Id.* (listing factors such as "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action") (internal quotation marks omitted). *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is appropriate where a "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience") (internal quotation marks and ellipses omitted).

On the "public interest" side, a court will consider "[a]dministrative difficulties" that occur "when litigation is piled up in congested centers instead of being handled at its origin." *Am. Dredging Co.*, 510 U.S. at 448 (internal quotation marks omitted). *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is warranted where a chosen forum "is inappropriate because of considerations affecting the court's own administrative and legal problems") (internal quotation marks and brackets omitted). Moreover, it is not fair to impose the burden of jury duty "upon the people of a community which has no

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majority did not dispute, that the highest level of Chinese courts has already resolved any jurisdictional issues in the Chinese action in favor of the Chinese court's jurisdiction over both parties. Pet. App. 42a-43a. Indeed, the district court here expressed its "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter." Pet. App. 67a n.11. Thus, the record is clear that Chinese courts, as a result of the Chinese action, present an adequate alternative forum, whose jurisdiction has already been confirmed—and in which the action is *actually* proceeding.

relation to the litigation." *Am. Dredging Co.*, 510 U.S. at 448 (internal quotation marks omitted). It is also more appropriate to try a case in a jurisdiction whose law governs, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 448-49 (internal quotation marks omitted).

Inherent in these public-private calculations are concerns of international comity, as this Court has acknowledged. *Am. Dredging Co.*, 510 U.S. at 464-67 (noting that *forum non conveniens* doctrine has been employed historically to ameliorate problems of international comity). In giving effect to the principle that foreign fora are usually more appropriate to litigate a dispute between non-U.S. parties, the Court in *Piper Aircraft Co.* explained that "a foreign plaintiffs' choice [of forum] deserves less deference" than that of an American plaintiff; thus, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." 454 U.S. at 255-56. The Court further held that a suit can be dismissed on *forum non conveniens* grounds even when the law in the alternative forum is less favorable to the plaintiff. *Id.* at 247.

Consistent with this principle of yielding to foreign sovereigns to adjudicate disputes that are more appropriately filed in their courts, this Court has displayed solicitude to the practices and autonomy of other sovereigns in a variety of contexts. *See, e.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 131-35 (2005) (noting that, out of considerations of international comity, American law does not apply to the "internal affairs" of foreign-flagged vessels); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (relying on comity to hold that Congress did not intend the Sherman Act to apply to foreign conduct that

caused foreign injury independent of any domestic effects).[8] At the same time, lower courts, in *forum non conveniens* and related contexts, have extended due respect to the Chinese judicial system, as the district court here did in expressing its "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter."[9] Pet. App. 67a n.11.

The importance of such issues of international comity further counsels against the Third Circuit's rule: The very purposes of *forum non conveniens*—which "appli[es] only in cases where the alternative forum is abroad," as 28 U.S.C.

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[8] *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (refusing to recognize a new cause of action under the Alien Tort Statute for violation of the law of nations in part because of "the potential implications for the foreign relations of the United States . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution").

[9] *See, e.g., Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 144-45 (S.D.N.Y. 2000) (holding, in a choice of law case, that the Court was bound to respect China's choice of public policy, apply Chinese law per New York's interest-based choice of law rules, and reject the argument that Chinese law violated New York public policy); *Lu v. Air China Int'l Corp.*, No. CV 92-1254 (RR), 1992 WL 453646, at *2 (E.D.N.Y. Dec. 16, 1992) (holding that government ownership of defendant corporation does not undermine the potential for fair resolution of the plaintiff's claim); *BP Chems., Ltd. v. Jiangsu Sopo Corp., Ltd.*, No. 4:99CV323CDP, 2004 U.S. Dist. LEXIS 27855, at *36 (E.D. Mo. Mar. 29, 2004) (noting that in other cases "China has been found to be an adequate alternative forum"). *See also* Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 150 (2005) ("In fact, rule of law has become a major source of legitimacy for China's current government."); Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 137 (2005) (describing judicial reform in China and noting "particularly impressive" results in Shanghai).

§ 1404(a) governs transfers within the federal-court system, *see Am. Dredging Co.*, 510 U.S. at 449 n.2—are frustrated when foreign companies are forced to engage in the full-blown expense and burden of making jurisdictional demonstrations, and the federal courts are expanding time, effort and resources to affirmatively establish jurisdiction, prior to dismissing a suit that was dismissable on *forum non conveniens* grounds at the outset. *See Tenet*, 544 U.S. at 6 n.4 (noting that "to first allow discovery or other proceedings in order to resolve the jurisdictional question" is "inconsistent" with the purpose of the *Totten* bar, which is "to defeat the asserted claims [and] to preclude judicial inquiry"). *See also, e.g.*, Feder, *supra*, 74 FORDHAM L. REV. at 3186 ("[A] strict structuring of non-merits issues would serve to frustrate the very flexibility that makes *forum non conveniens* such a valuable tool for judicial consideration of internationally tinged disputes.").

As Judge Stapleton explained in dissent, the majority's rule "subverts a primary purpose of the doctrine of *forum non conveniens*"—"protect[ing] a defendant" (in this case, Sinochem, a foreign company) "from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." Pet. App. 33a. But the decision below raises an even more troubling issue: The majority did not even take into account the "public interest" side of the *forum non conveniens* equation. As the district court observed, there is scarcely any relation of this litigation to the United States. *See* Pet. App. 66a ("The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates."). *But see* n.1, *supra*. Moreover, "the matter is expected to proceed in the Guangzhou court. . . . We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that

both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782." Pet. App. 43a.

Finally, allowing *forum non conveniens* to be decided at the outset will ensure that the doctrine does not become an illusory protection for foreign litigants. Compared with the jurisdictional rules that prevail in most other countries, the bases for jurisdiction in United States courts are exceedingly generous to plaintiffs. *Forum non conveniens* has thus properly been regarded in the international arena as a flexible tool for limiting the risk that essentially foreign disputes would nonetheless be drawn to United States courts. *See Piper Aircraft*, 454 U.S. at 252 & n.18 (noting that "[t]he American courts . . . are already extremely attractive to foreign plaintiffs," and declining to adopt a rule that would further increase "[t]he flow of litigation into the United States . . . and further congest already crowded courts"); *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1982) (U.K.) ("As a moth is drawn to the light, so is a litigant drawn to the United States."). Indeed, international comparative-law scholars have praised the "more flexible" "framework within which the *forum non conveniens* considerations are examined in the United States," noting that "[t]he great virtue of the *forum non conveniens* approach is its flexibility." J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 15, 30 (1995).

### B. It Is Inefficient To Demand That Courts Conclusively Ascertain Personal And Subject-Matter Jurisdiction As A Precondition To Dismissing In Favor Of Litigation In A Foreign Tribunal

There is no dispute that the rule adopted by the Third Circuit (and three other Courts of Appeals) is inefficient. Indeed, the panel majority itself recognized that its own rule "may not seem to comport with the general interests of judicial economy." Pet. App. 26a. The majority

acknowledged that "[w]e do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." Pet. App. 26a. That "regret" is in itself a strong indication that the Court of Appeals' decision was incorrect. In fact, because of its recognition of just how undesirable its rule is, the majority expressly invited this Court to correct its decision: "If the Supreme Court wishes otherwise, we leave that determination to it." Pet. App. 26a.

In his dissenting opinion, Judge Stapleton agreed and emphasized the extent of the inequities wrought by the majority's decision: It "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." Pet. App. 33a. Reversal of the Third Circuit's decision will restore the proper balance, and allow district courts to dismiss actions inappropriately filed in the United States consistent with the "just, speedy, and inexpensive" mandate of federal law. FED. R. CIV. P. 1; *see also Societe Nationale Industrielle Aerospatiale v. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 542-43 (1987) (holding that "first resort to [Hague] Convention procedures whenever discovery is sought from a foreign litigant" is not required because "[i]n many situations the . . . procedure authorized by the Convention would be unduly time consuming and expensive . . . . A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts. *See* Fed. Rule Civ. Proc. 1.").

### C. Consideration Of *Forum Non Conveniens* In The First Instance Can Avoid Federal Court Entanglement In Difficult Constitutional Questions, Whose Resolution Would Be Purely Advisory

Finally, the Court of Appeals' opinion is inconsistent with the principle of constitutional avoidance. This was one of

the justifications for the rule adopted in *Ruhrgas*. There, the Court explained that subject-matter jurisdiction need not invariably be determined prior to personal jurisdiction where "a district court has before it a straightforward personal jurisdiction issue presenting no complex questions of state law," whereas "the alleged defect in subject-matter jurisdiction raises a difficult or novel question." *Ruhrgas*, 526 U.S. at 588. *See also Steel Co.*, 523 U.S. at 111-12 (Breyer, J., concurring) ("[T]o insist upon a rigid 'order of operations' in today's world of federal-courts caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost. . . . It means a more cumbersome system. It thereby increases, to at least a small degree, the risk of the 'justice delayed' that means 'justice denied.'") (internal citations omitted).

The venerable doctrine of constitutional avoidance has played an important role in this Court's jurisdictional decisions. *See, e.g., Elk Grove Unified Sch. Dist.*, 542 U.S. at 11 (emphasizing the "'deeply rooted' commitment 'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary" and dismissing the suit on prudential standing grounds to avoid deciding a difficult First Amendment question) (citation omitted); *Leroy*, 443 U.S. at 181 ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available."); *Steel Co.*, 523 U.S. at 112 (Stevens, J., concurring in the judgment) ("Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, the Court should answer the statutory question first.") (internal citation omitted).[10] These cases

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[10] *See also Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568 (1947) ("[T]his Court has followed a policy of strict necessity in

"illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans*, 415 U.S. at 547 n.12.

In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates potentially significant due process issues under the Fifth Amendment. *See* Pet. App. 60a ("Under [Fed. R. Civ. P.] 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis."). As the Court explained in *Leroy*, where, as here, a long-arm statute authorizes jurisdiction over non-residents "consistent with the Constitution and laws of the United States," *see* Fed. R. Civ. P. 4(k)(2), a court undertaking a personal-jurisdiction analysis must necessarily "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. 443 U.S. at 181. Thus, "[a]s a prudential matter it is our practice to avoid unnecessary decision of [such] novel constitutional questions." *Id.* Indeed, in this case, the district court granted the motion to dismiss on *forum non conveniens* grounds only after examining in detail every basis for personal jurisdiction and concluding that only with further discovery would the

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disposing of constitutional issues."); *Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) (It is the "considered practice not . . . to decide any constitutional question in advance of the necessity for its decision.") (internal citations omitted); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) (same).

court be able to ascertain whether it has personal jurisdiction over Sinochem. *See* Pet. App. 59a.

Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional ground for decision, it is therefore more consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery and subsequent litigation, whether the court has personal jurisdiction over Sinochem consistent with the Due Process Clause.

* * * *

In sum, the Third Circuit should have reviewed, for abuse of discretion, the district court's dismissal on threshold non-merits grounds of *forum non conveniens*, rather than holding that the district court should have conclusively established jurisdiction before dismissing for *forum non conveniens*. This Court should reverse and order those proceedings to occur on remand.

## CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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In The

# Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD,

*Petitioner,*

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

The question presented is:

Whether a district court should establish jurisdiction before dismissing a suit on grounds of *forum non conveniens*?

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are Petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and Respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

As to Respondent, its parent corporation is **Malaysia International Shipping Corporation Berhad**; **Petroliam Nasional Berhad** is a publicly held company that holds 10% or more of the party's stock.

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## BRIEF FOR RESPONDENT

The complaint in this case, filed by a shipowner whose vessel loaded cargo in the port of Philadelphia, avers negligent misrepresentation against Sinochem International Co. Ltd. ("Sinochem"), a Chinese state-owned steel importer. The misconduct began after a review of documents by Sinochem following an Order from the Eastern District of Pennsylvania permitting subpoenas to issue against Philadelphia companies involved in the loading of the Motor Vessel HANDY ROSELAND.

The Third Circuit joined the Fifth Circuit, although under different bases, in holding that personal jurisdiction should be established before a court rules on a motion to dismiss based on *forum non conveniens*. The bright line test, established by either Circuit, will better serve the administration of justice.

## JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This case arises out of the issuance of an ocean bill of lading in the United States following the loading of cargo onto a vessel docked at a port within the United States. Both parties to this action are foreign corporations who were, at least for the transaction involved in this matter, conducting business in the United States with an American corporation. In fact, the connection between the

parties derives solely from their separate dealings with the American corporation.

Respondent Malaysia International Shipping Corporation ("MISC") is the owner of the M/V HANDY ROSELAND. Respondent filed suit against Petitioner Sinochem, the purchaser of the subject cargo, alleging that Sinochem fraudulently misrepresented that MISC antedated a bill of lading while the vessel was docked at a port in Fairless Hills, Pennsylvania, in order to arrest the vessel when it arrived in China. It is claimed that the resultant delay from the arrest caused Respondent significant damages.

On or about February 13, 2003, Sinochem, entered into a contract with Triorient Trading, Inc. ("Triorient"), for the purchase of 20,000 prime hot-rolled steel coils.[1] The coils were to be loaded at a main port in the United States and shipped to a port in Huangpu, China. The contract designated the time of shipment to be "[o]n or before 30 April 2003." Sinochem then caused a letter of credit to be opened by the Bank of Communications in Shanghai to provide security to Triorient for the purchase price of the steel coils and to effect payment. The letter of credit required that certain documents be tendered to the bank to trigger payment. One such document was an ocean bill of lading, which was to be dated on or before April 30, 2003, in order to establish that the steel cargo was loaded onto the nominated vessel no later than that date.

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[1] Sinochem is a Chinese corporation which maintains its principal place of business in Beijing, China. Triorient is located at Two Stamford Avenue, 281 Tresser Boulevard, Stamford, Connecticut.

M/V HANDY ROSELAND is a vessel which sails under the Malaysian flag. At the time in question, the M/V HANDY ROSELAND was being chartered to Progress Bulk Carriers, subchartered to Pan Ocean Shipping Co., Ltd. ("Pan Ocean"), and further subchartered to Triorient. Triorient arranged for the shipment of the steel coils to Sinochem aboard the M/V HANDY ROSELAND. Triorient, through its broker, arranged with Novolog Bucks County, Inc. ("Novolog"), a stevedoring company located in Fairless Hills, Pennsylvania, for the berthing of the M/V HANDY ROSELAND and the subsequent loading of the steel cargo onto the vessel. The estimated date for the vessel's arrival at Fairless Hills was April 24, 2003, with an estimated date of departure from Fairless Hills on April 30, 2003.

The steel coils purchased by Sinochem were stowed in Holds 1 through 5 of the vessel. On April 30, 2003, after Novolog loaded the last steel coil for Triorient onto the M/V HANDY ROSELAND, Bill of Lading No. T01 was issued, which evidenced that the loading of the steel coils was completed "on or before April 30, 2003," in accordance with the contract between Triorient and Sinochem. The bill of lading also noted that the conditions of carriage were "as per charter party." On that same date, Novolog generated a Mate's Receipt indicating that the loading of the subject steel coils had been completed on April 30, 2003. The Mate's Receipt was signed by the Master of the M/V HANDY ROSELAND. Novolog continued loading other cargo onto the M/V HANDY ROSELAND, and the vessel left Fairless Hills en route to China on May 2, 2003. The vessel was scheduled to arrive at the Huangpu Port in China in the beginning of June, 2003.

On May 15, 2003, while the vessel was proceeding to China, Sinochem instituted a miscellaneous action in the

United States District Court for the Eastern District of Pennsylvania against Triorient and Bank of Communications, docketed at 03-MC-87, for the purpose of taking discovery for use in legal proceedings that it was planning to file in China.[2] The discovery was to include subpoenas requesting various documents from Novolog and Barwil (the local husbanding agent for the vessel), all of which were located within the jurisdictional boundaries of the district court, including various communications to/from the vessel related to its arrival, loading, and departure; records of loading; the contract for loading; the charter party; the port statement of facts, and the bill of lading. On May 16, 2003, the district court entered an Order permitting Sinochem to conduct the requested discovery.

On June 8, 2003, Sinochem filed a preservation application in the Guangzhou Admiralty Court in the People's Republic of China alleging that the subject bill of lading was fraudulently dated April 30, 2003, and that the loading of the steel coils allegedly was not completed until May 1, 2004. In filing the application, Sinochem sought an Order authorizing the arrest of the M/V HANDY ROSELAND upon its arrival in China.

The Guangzhou Admiralty Court granted the application on the same date and immediately issued a Vessel Arresting Order, authorizing the arrest of the vessel subject to the posting of security in the amount of $9

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[2] In the Spring of 2003, after Sinochem contracted to purchase the steel coils, the price of hot rolled steel coils fell sharply. http://www.thehindubusinessline.com/2003/04/16/05hdline.htm (follow "Tara Steel dips" hyperlink) (last visited Dec. 6, 2006). Sinochem's actions against Respondent coincide with this change in the market and it was no doubt the precipitating factor.

million U.S. dollars, as well as $15,000 (U.S.) for a fee associated with the enforcement of the Vessel Arresting Order. The Order did not address the substantive nature of Sinochem's claim, but rather, was merely a procedural mechanism to obtain security in the event Sinochem decided to proceed in filing a lawsuit against MISC. In fact, the Order specified that Sinochem had 30 days to file a full complaint with the Chinese Admiralty Court.

The M/V HANDY ROSELAND was arrested at the Huangpu Port in China on or about June 8, 2003. At or about that same time, Sinochem took possession of the subject cargo under Bill of Lading No. T01, without any claim of damage to it during shipment. In order to avoid further delay in the vessel's sailing schedule, MISC posted the requisite bond, and the vessel was released. In response to Sinochem's activities in China, MISC filed this lawsuit on June 23, 2003, alleging that Sinochem negligently misrepresented that the vessel was not loaded as required by contract and as per the bill of lading and, as a result, MISC sustained various damages.

On July 2, 2003 Sinochem filed a complaint against MISC and others in the Guangzhou Admiralty Court, alleging that Bill of Lading No. T01 and the Mate's Receipt were fraudulently antedated. By filing its complaint, Sinochem is attempting to avoid paying for the subject steel. MISC was served with the complaint on July 23, 2003, and subsequently challenged the jurisdiction of the Guangzhou Admiralty Court on the grounds that the bill of lading incorporated the charter party arbitration clause, and that MISC already commenced a lawsuit against Sinochem in the United States. The Guangzhou Admiralty Court initially dismissed MISC's jurisdictional challenges,

but MISC filed an appeal with the Guangdong Provincial High Court.

On March 17, 2004, the Guangdong Provincial High Court of the People's Republic of China issued a civil decision upholding the jurisdiction of the Guangzhou Admiralty Court as to Sinochem's claim. However, the Court also acknowledged that MISC's claim could be brought in the United States, and to do so would neither offend the notion of sovereignty, nor interfere with the jurisdiction of the Chinese Court. The Guangdong Court addressed the issue raised by MISC that there was a proceeding instituted in the United States prior to the commencement of the Chinese action by Sinochem. Of importance, the Court stated that "China and the [US] are two independent sovereignties and countries with different legal systems; whether the appellant [MISC] lodged the lawsuit in the court of the [US] shall not affect the independent jurisdiction over this case as enjoyed by the [Chinese] court." (J.A. 22) (clarification added).

## SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Court of Appeals for the Third Circuit based on the following:

Determining subject matter and personal jurisdiction at the outset of ruling on a motion to dismiss on *forum non conveniens* is consistent and comports with Supreme Court precedent. The central argument is not whether one addresses a burgeoning federal court docket by allowing more *forum non conveniens* actions regardless of the presence of jurisdiction, but rather, whether it is right to disturb a jurisdictional prerequisite that derives from

Article III of the Constitution and the laws of Congress, simply to achieve judicial economy. Since a *forum non conveniens* analysis necessarily involves two fora which can hear the case, it is axiomatic that the one forum where the court is sitting should first assure itself of jurisdiction. Not every case contains the complexities forecast by Petitioner or Amicus. Nevertheless, personal jurisdiction is a factor in *forum non conveniens*, and whether it be deemed merits based or non-merits based, it is a necessary component from the outset.

Adopting the holding of the Third Circuit comports most closely with current precedent, especially as related to hypothetical jurisdiction and jurisdictional resequencing. It removes ambiguity, yet by the very nature of the personal jurisdiction or *forum non conveniens* analysis still retains for the district judge enormous discretion in reaching a decision.

Balancing the factors involved in reaching a *forum non conveniens* decision inevitably requires the court to consider the substantive issues that will arise at trial. Whether that rises to the level of a merits based decision does not change the fact that a court may not proceed without jurisdiction, for to do so is to act *ultra vires*.

Finally, the limited nature of the doctrine does not result in undue hardship. Initially, a review of cases will suggest that the complicated and multi-faceted phases of a *forum non conveniens* analysis take far more time and are more complicated than ascertaining subject matter and personal jurisdiction. One must concede that there is often an overlap in factual and legal issues addressed in *forum non conveniens*. The ultimate goal, to reduce and uncomplicate the issues in a case before a court, may well be

laudable. Even if that objective is satisfactory, though, one cannot achieve it by any means whatever. The mere fact that the objective, i.e., avoiding delicate or complicated issues, is perfectly laudable does not mean that it can be achieved at the expense of Court precedent and jurisdictional mandates.

## ARGUMENT

### I. A FEDERAL COURT MUST ASCERTAIN JURISDICTION BEFORE CONSIDERING A MOTION TO DISMISS ON *FORUM NON CONVENIENS*

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. Because the district courts of the United States are created by the Congress and have no ability to act except within the limitations imposed by Congress, they are by design and desire courts of "limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). In order to resolve a case, a federal district court must have both "authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). The language pertaining to jurisdiction is clear and unequivocal. In fact, this Court has historically held that absent a finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare

> the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

*Ex parte McCardle*, 74 U.S. 506, 514 (1868). This concept was cited with approval by this Court in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

### A. The Threshold Matter – Jurisdiction – Is What Gives a Court the Authority to Rule on Merits and Non-Merits Issues.

In establishing district courts, Congress has always premised a court's ability to act on the presence of jurisdiction. *Employers Corp. v. Bryant*, 299 U.S. 374 (1937). As that Court noted:

> By the act of March 3, 1875, c. 137, 18 Stat. 472, dealing with the jurisdiction of the circuit (now district) courts, Congress provided, in § 5, that if a circuit court should be satisfied at any time during the pendency of a suit brought therein, or removed thereto from a state court, that "such suit does not really or substantially involve a dispute or controversy properly within" its "jurisdiction," the court should proceed no further therein, but should "dismiss the suit or remand it to the court from which it was removed, as justice may require."

*Id.* at 378.

This Court addressed the issue of the application of the doctrine of *forum non conveniens* as it relates to personal jurisdiction in its opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The Court held that "[i]ndeed, the doctrine of *forum non conveniens* can **never**

apply if there is absence of jurisdiction or mistake of venue." *Id.* at 504. (emphasis added).

Neither subject matter jurisdiction nor personal jurisdiction may be lacking prior to a court proceeding to adjudicate a matter. In *Employers Corp. v. Bryant*, the Court held:

> By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam*, . . . is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.

299 U.S. 374, 382 (1937). This principal was affirmed in *Ruhrgas AG v. Marathon Oil Co.*, when the Court held that while the essence of subject matter jurisdiction and personal jurisdiction differ, these two "jurisdictional bedrocks" must be present:

> These distinctions do not mean that subject-matter jurisdiction is ever and always the more 'fundamental.' Personal jurisdiction, too, is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'

*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999), *quoting Employers Corp. v. Bryant*, 299 U.S. 374, 382 (1937).

In *Ruhrgas*, a controversy over a venture to produce gas in the North Sea, Petitioner removed the cause of action commenced by Marathon citing diversity jurisdiction, federal question jurisdiction (the claims dealt with international relations), and 9 U.S.C. § 205 relating to international arbitration agreements. Ruhrgas moved to

dismiss the complaint for lack of personal jurisdiction. Marathon claimed lack of subject matter jurisdiction, and moved for a remand instead. The district court remanded the case, and on appeal to the Fifth Circuit, that court reversed, holding that an inquiry into subject matter jurisdiction must first be decided before proceeding to personal jurisdiction.

Prior to *Ruhrgas*, the Court decided *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). That case involved a citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, and at the time of filing, the allegations that defendant failed to file paperwork providing information about hazardous and toxic chemicals had already been corrected by defendant. The issue raised in the suit was whether the statute provided jurisdiction to rule on the purported violations of the Act. *Id.* While the holding specific to the case resulted in a finding that there was jurisdiction, the case is noteworthy in its conclusions about hypothetical jurisdiction. Prior to this period the appellate courts had grown fond of assuming subject matter jurisdiction for the purposes of deciding the merits of a case. This doctrine "[stood] in sharp contrast to these bedrock tenets of federal judicial power." Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts,* 52 Vand. L. Rev. 235 (1999). The Court in *Steel* addressed this issue, and held that hypothetical jurisdiction violated the framers' intent to provide limits on judicial power, and resulted in offending the foundation of the separation of powers. *Steel Co.*, 523 U.S. at 94-95. The Court noted:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental

> principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases.

*Id.* The Court then referenced the language in *Ex parte McArdle* confining the power of the federal courts.

Just a year later, relying on *Steel*, Justice Ginsburg authored the *Ruhrgas* opinion, reaffirming the concept that "[j]urisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas*, 526 U.S. at 583. While acknowledging that subject matter jurisdiction "customarily" is resolved first, the Court held merely that both aspects of jurisdiction are "fundamental" and "essential", and thus the courts had discretion over which to resolve first in those circumstances where an inquiry into subject matter jurisdiction would be comparatively more complex or entailed. *Id.* The fact is that judicial economy or restraint did not compel the decision; rather the holding represented a position that was not in conflict with the power of the courts to act. Regardless, the effects of *Steel* were interpreted differently by certain courts, culminating in the split between the circuits presented before this Court.

Personal jurisdiction thus can be both a form of jurisdiction and a non-merits issue. The difficulty Petitioner and Amicus have with the decision in this case appears to be the overlapping of personal jurisdiction in the context of jurisdiction (along with subject matter) with non-merits issues (including venue or *forum non conveniens*). They argue that since *Ruhrgas* allo[illegible] personal jurisdiction analysis to trump a subject matt[illegible]urisdiction

inquiry, then the holding in reality speaks to the non-merits aspect of personal jurisdiction. Thus, according to Petitioner, the other non-merits issues, including *forum non conveniens*, are part of the *Ruhrgas* holding.[3] This is not an accurate statement of the Court's holding in *Ruhrgas*.

The scenario exists, as it did in the present case, that a court could be presented with various grounds for dismissal of an action; indeed the record here reflects that Sinochem sought dismissal for lack of subject mater jurisdiction, lack of personal jurisdiction, *forum non conveniens*, and comity. Pursuant to *Ruhrgas,* the district court could have looked at either subject matter jurisdiction or personal jurisdiction first. From the record, we know that Respondent's "allegations with respect to [Petitioner's] enterprises in this country, as well as undisputed facts averred with respect to how the contract was carried out, render [Respondent's] claim far from frivolous." *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 2004 U.S. Dist. LEXIS 4493, *27 (E.D. Pa. Feb. 27, 2004), *rev'd* 436 F.3d 349 (3d Cir. 2006). But the matter was not conclusively resolved. When Petitioner challenged personal jurisdiction, a discrete inquiry would have been necessary to ascertain personal jurisdiction over Sinochem. In this case, then, subject matter jurisdiction was the first issue to be resolved.[4] If, however, the district court

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[3] Petitioner suggests that the Third Circuit decision finds that "federal courts are prohibited from declining [the power to hear a case] in the first instance. . . . " Pet Br. 11. Rather, the view should be that a court must assure itself of the power to hear a dispute, and that requires a finding of both subject matter and personal jurisdiction.

[4] Note, though, in *Ruhrgas* the Court still determined that it was easier, and presumably consistent with Rule 1 calling for the "just,

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had chosen to address *forum non conveniens* first, what incentive is there for a court to do anything but grant the motion and dismiss? If a court goes down the long and winding road associated with the *Gulf Oil* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) factors, *see infra* at I.C., without determining subject matter jurisdiction, and determines it would be improvident to grant the motion to dismiss, but then discovers it has no jurisdiction, there is no judicial economy there. *See, e.g., Intec USA LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006). Permitting a court to dismiss a case before it has even determined whether it can hear the case is simply contrary to the limited basis of jurisdiction federal courts enjoy.

Without a finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate most other issues – including a determination of *forum non conveniens*:

> The doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter **and personal jurisdiction** and is a proper venue.

(emphasis added). 15 Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 3828 (2d ed. 1986). The concern expressed by Petitioner that abstention, for example, is unaffected by Respondent's position is not relevant. Petitioner is correct that *Steel Co.* does not prohibit

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speedy, and inexpensive determination of every action", Fed. R. Civ. P. 1, to direct the parties to undergo the jurisdictional discovery to ascertain personal jurisdiction. Finding that the defendant's contacts were insufficient to support personal jurisdiction, the district court remanded the action. *Ruhrgas, supra*, at 584.

decisions on "discretionary jurisdictional question[s]". *See Steel Co.*, 523 U.S. at 100 n.3. If the Third Circuit decision stands, as it should, abstention remains unaffected by a finding that personal jurisdiction should be ascertained before ruling on a *forum non conveniens* motion. Venue also remains unaffected if the Court affirms the judgment below, for sound reasons. *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

Consider, for example, a matter filed in state court. If the defendant timely removes the case to federal court, it may do so only in the district court where the state court is located. The facts of the dispute may then reveal, at that early stage, that venue is improper due to various issues, including perhaps a forum selection clause. It is entirely appropriate to rule on the venue matter at that juncture,[5] then allow the next court to deal with the issues of establishing jurisdiction. The other bases raised by Petitioner are similarly explained, and do not interfere with the current issue.

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[5] Left for another day is the fact that a circuit split has arisen on this issue as well. A lack of venue challenge, based upon a forum-selection clause, is sometimes brought as a Rule 12(b)(3) motion to dismiss for improper venue. *See, e.g., Kukje Hwagje Ins. Co. v. M/V HYUNDAI LIBERTY*, 408 F.3d 1250 (9th Cir. 2005); *Continental Ins. Co. v. M/V ORSULA*, 354 F.3d 603 (7th Cir. 2003); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998). Other courts hold that such dismissals are founded on Rule 12(b)(6). *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993). Still other courts looked to Rule 12(b)(1). *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 152 (2d Cir. 1984) (dismissal sought pursuant to 12(b)(1) motion for lack of subject matter jurisdiction).

## B. The Third Circuit Decision Is Consistent with this Court's Precedent

Three conflicting approaches presently exist in the circuit courts related to jurisdiction and *forum non conveniens*. Despite *Ruhrgas*, there has been some dispute among the circuits as to whether *forum non conveniens* is a "non-merits" grounds for dismissal, and, therefore, may be adjudicated prior to the establishment of jurisdiction.

### 1. *Forum non conveniens* is non-merits.

#### a. The Second and D. C. Circuits limit *Steel* to still permit a hypothetical jurisdictional analysis.

The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002).[6] Similarly, in *In re Papandreou*, 139 F.3d

[6] A district court judge in New York recently provided an analysis updating and maintaining the Second Circuit position in light of the circuit split. *Turedi v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006). The opinion gives a thoughtful analysis of whether *Monegasque* should stand in light of the Third Circuit opinion on the issue. The factors of administration of justice and a judge's "inherent power to manage the administration of justice efficiently and fairly, counsels for more rather than less pragmatism and flexibility . . . " *Id.* at *12. Nevertheless, the decision does not address the extensive analysis a *forum non conveniens* analysis entails, nor does it consider the circumstance that the motion to dismiss may be denied, and the court may then be left with no jurisdiction. Compare the decision of that court to review the analysis and comport with existing Second Circuit precedent, with that of *Intec USA LLC. v. Engle*, 467 F.3d 1038 (7th Cir. 2006) (acknowledging split between the circuits, and while disagreeing

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247 (D.C. Cir. 1998), the D.C. Circuit held that *forum non conveniens* is a "non-merits" grounds for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou* at 255. (Note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas*, *supra.*)

**b. The Third Circuit finds *forum non conveniens* to be non-merits, and determines courts must first address jurisdictional prerequisites.**

Agreeing with the Second and D.C. Circuits, the Third Circuit held that *forum non conveniens* was non-merits based, basing its ruling on the language of personal jurisdiction in *Steel* and *Ruhrgas. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349 (3d Cir. 2006). In these cases, this Court found that personal jurisdiction was a non-merits ground, after reviewing that *forum non conveniens* was not a constitutional Article III jurisdictional issue, after comparing it with other categories. *Id.* at 358-59. The court determined, though, that jurisdiction had to be established because first, *forum non conveniens* "presumes that the court deciding this issue has personal jurisdiction," and second, inferential Court precedent mandates that "*forum non conveniens* dismissals are invalid if the court does not have subject matter jurisdiction." *Id.* at 361-62.

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with the Third Circuit, decides to confirm subject matter jurisdiction before reviewing the district court's dismissal on *forum non conveniens*). In an analysis far shorter than many of the *forum non conveniens* opinions, the Seventh Circuit determined that no jurisdiction existed, and vacated and remanded the case with instructions for the district court to dismiss it for lack of subject matter jurisdiction.

### 2. The Fifth Circuit finds that *forum non conveniens* is merits-based.

Prior to the Third Circuit decision, the Fifth Circuit had already expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005), the court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. The case involved an auto accident in Mexico related to alleged defects with the General Motors vehicle, as well as defects to the Cooper Tire & Rubber Company tire. The plaintiffs were Mexican nationals. The Court expressly rejected the plaintiff's argument to follow the other circuits, holding:

> Appellants urge an expansive reading of *Ruhrgas*, arguing that the Supreme Court authorized a court to pretermit a ruling on jurisdiction and decide the case on any "non-merits" issue. They then characterize *forum non convieniens* as a non-merits issue. As stated above, we do not read *Ruhrgas* broadly enough to allow us to pretermit a decision on jurisdiction before deciding some other "non-merits" issue. Even, however, if we could read *Ruhrgas* that broadly, we are satisfied, based on our precedent, that the question of the convenience of the forum is not 'completely separate from the merits of the action.' *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-28 (1988).

*Dominguez-Cota*, 396 F.3d at 653. The Fifth Circuit held it could not separate the *forum non conveniens* analysis from the merits because the private factors to be considered under *Gilbert*, for example, required a court to reach the merits. *Id.* at 654. The court relied on *Van Cauwenberghe*

and *Gilbert* to reach its holding that *forum non conveniens* gets entangled in the merits.

*Van Cauwenberghe* looked at jurisdictional elements in the realm of appealable orders under 28 U.S.C. § 1291. Courts were cautious to maintain the deference due the independence of the district judge, and to prevent piecemeal appeals. Therefore, when the district court denied the motion to dismiss on the ground of *forum non conveniens*, this Court upheld that finding, relying on "the majority of the Courts of Appeals that have considered the issue, that the question of the convenience of the forum is not 'completely separate from the merits of the action' . . . and thus is not immediately appealable as of right." *Van Cauwenberghe*, at 527.

The Fifth Circuit suggests that balancing the factors involved in reaching a *forum non conveniens* decision inevitably requires the court to consider the substantive issues that will arise at trial. Jurisdiction was not part of that analysis; instead, the intermingling of *forum non conveniens* with the merits seemed entirely consistent with appellate rulings at the time, and obviously met with the approval of this Court.[7]

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[7] The Supreme Court cited to *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987) ("[T]he determining factors in a *forum non conveniens* motion are enmeshed in the underlying cause of action); *Partrederiet Treasure Saga v. Joy Manufacturing Co*, 804 F.2d 308, 310 (5th Cir. 1986) (same); *Rosenstein v. Merrill Dow Pharm. Inc.*, 769 F.2d 352, 354 (6th Cir. 1985) (same); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195 (3d Cir. 1983). Only one circuit has held that the denial of a motion to dismiss on the grounds of *forum non conveniens* is immediately appealable under 28 U.S.C. § 1291. *See Hodson v. A. H. Robins Co.*, 715 F.2d 142, 145 n.2 (4th Cir. 1983). With the exception of the Fourth Circuit, all of the courts referenced readily

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The Court went on to establish that, inherently, in order to perform the necessary *forum non conveniens* analysis required under *Gulf Oil*, a court must analyze the merits of the case. *Dominguez-Cota*, 396 F.3d at 654. Therefore, the issue for the Fifth Circuit remains merits-based.

This Court has addressed the issue of the application of the doctrine of *forum non conveniens* with regard to personal jurisdiction in its opinion in *Gulf Oil v. Gilbert*. The language pertaining to jurisdiction is clear and unequivocal. This Court held that "[i]ndeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." 330 U.S. at 504. In fact, the holding is premised on prior cases, where historically the Court has held that absence of finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function reaming to the court is that of announcing the fact and dismissing the cause.

*Ex parte McCardle*, 74 U.S. 506, 514 (1868).

As the Third Circuit noted in its opinion, the Fifth Circuit expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota*, the Court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. This decision was analyzed in light of other holdings by the Seventh and Ninth Circuits, and distinguished cogently

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acknowledged that the *Gulf Oil* factors in a *forum non conveniens* motion analysis necessarily involved issues related to the merits.

the deficiencies in the Second Circuit Opinion, and the timing of the D.C. Court Opinion in relation to subsequent Supreme Court rulings.

The present dispute confronts an issue that has split the various circuit courts which have considered the issue. The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002). Similarly, in *In re Papandreou*, the D.C. Circuit held that the doctrine of *forum non conveniens* is a non-merits ground for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou*, at 255 (note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas*).

### C. The Doctrine of *Forum Non Conveniens* Itself Compels a Court to Ascertain Jurisdiction.

Recall the impact of the doctrine of *forum non conveniens*: It gives a court the discretion to decline the exercise of otherwise existing jurisdiction after determining that there is another available forum to hear the case.[8] "We note that *forum non conveniens* is a limited doctrine, typically applying when the alternative forum is in a foreign country or a state court." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice*

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[8] *See, e.g., In re Bridgestone/Firestone, Inc.*, 420 F.3d 702 (7th Cir. 2005) (District court dismissed on *forum non conveniens* grounds when it also held it had no jurisdiction over the case remanded. New information became available while the appeal was pending that the alternative forum was no longer available.).

*and Procedure* § 3828, at 278-80 (2d ed. 1986). This is because 28 U.S.C. § 1404(a) covers inconvenient forum issues within the federal court system." *Malaysia*, 436 F.3d 349, 358 n.19.

*Gulf Oil* and *Piper* lay out the procedure for this analysis: The first step is to determine the appropriate forum, noting that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil*, 330 U.S. at 507. Clearly, the forum where the suit is filed must be correct; subject matter and personal jurisdiction help establish that. Next the private interest factors are considered:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

*Id.* at 508.

*Forum non conveniens* is considered when one court having jurisdiction determines that there is another court that is better suited to hear the case. Specifically, "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil*, 330 U.S. at 506-07. The doctrine is completely discretionary. *Forum non conveniens* is similar to personal jurisdiction in

that both are procedural issues, but their distinction is that personal jurisdiction is a question of law while the former is not. Therefore, a court must resolve that threshold issue.

### D. The Limited Nature of the Doctrine Does Not Result in Undue Hardship.

The notion of discovery for the purposes of establishing personal jurisdiction is not new to district courts. In *Toys R Us, Inc. v. Step Two, S.A.* 318 F.3d 446, 455-58 (3d Cir. 2003), the Third Circuit held that the district court erred in not allowing jurisdictional discovery. Perhaps it is the suggestion that ascertaining jurisdiction results in judicial inefficiency as compared to ruling on a motion for *forum non conveniens*. In practice, nothing could be further from the truth. Considering the intensive and time consuming analysis that it takes to rule on a motion for *forum non conveniens*, one must concede that personal jurisdiction is much more easily disposed of in the majority of cases than is the dual balancing of factors required under a *forum non conveniens* analysis.

In support of his position that courts may dismiss on *forum non conveniens* grounds before addressing jurisdiction, Amicus argues that to rule otherwise would result in significant judicial resources being devoted to resolve questions over jurisdiction. Elsewhere in its Brief, however, the government recognizes that there is often an overlap in factual and legal issues when addressing the respective issue. It is also conceded that when deciding *forum non conveniens* issues, courts often are required to "at least take a peek at the merits." Nor is there support provided by Amicus for its statement that additional significant judicial resources would need to be devoted

if courts are first required to address the question of jurisdiction. While specific statistics on the number of cases in which *forum non conveniens* is an issue are not readily available, comparing the breakdown of cases filed in the courts overall shows that they represent only a very small fraction of the cases on the federal court dockets. Office of Judges Programs Statistics Division, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics* (Mar. 31, 2006), http://www.uscourts.gov/caseload2006/contents.html. Finally, the notion that another country is expected to determine its jurisdictional status, but a U.S. district court need not bother with the determination prior to a *forum non conveniens* dismissal seem vastly astray from the notion of comity, in that one would expect our own courts to undertake at least the level of work we are asking other courts to perform.

Of course, one cannot fault Petitioner or Amicus for the comments about the supposed waste of resources, given the language in the opinion of the Third Circuit.[9] However, Respondent disagrees with the dictum that the holding results in a waste of judicial resources. As noted, the exercise of evaluating the public and private factors regarding the motion are extensive and time consuming. In maritime cases, for example, the *Lauritzen/Rhoditis* factors are sometimes added to an analysis of similar issues and courts spend pages of a decision determining what status to give a single factor such as the flag of the

[9] We respectfully disagree with Petitioner's spin that the Third Circuit panel was so unhappy with its holding that it immediately sought Supreme Court review to correct it (mindful that *en banc* review of the decision was sought but not granted). Respondent, instead, views the glass as half-full instead of half-empty, and maintains that the review is being sought to bring the other circuits in line with the Third.

vessel. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Lauritzen v. Larsen,* 345 U.S. 571 (1953). For example, in this case, for the motion Sinochem filed, affidavits from **six different countries** apparently needed to be submitted for Sinochem to make its case. If Fed. R. Civ. P. 1 applies to practitioners as well as the court, *forum non conveniens* is vastly wasteful to the resources of the parties, and not just to a court. On the other hand, a motion to dismiss for lack of personal jurisdiction is direct, and the courts have leeway in deciding such a motion. *Leonard A. Feinberg, Inc. v. Central Asia Capital Corp.*, 936 F. Supp. 250 (E.D. Pa. 1996). ("considerable procedural leeway" exists including consideration of affidavits, or a hearing, or discovery).

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

*Petitioner*,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

In its opening brief, Sinochem showed that federal courts may make rulings on threshold, non-merits issues other than personal and subject-matter jurisdiction without running afoul of the bar on "hypothetical jurisdiction" first articulated in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and explained since then in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), *Kowalski v. Tesmer*, 543 U.S. 125 (2004), and *Tenet v. Doe*, 544 U.S. 1 (2005).

Since then, the United States has filed a brief agreeing with this position, for good and important reasons. The Seventh Circuit, too, has endorsed Sinochem's position: "[Judge Stapleton] maintained that jurisdiction is vital only if the court proposes to issue a judgment on the merits. *Ruhrgas* says as much, 526 U.S. at 584-85, though in dictum. . . . It seems to us the right approach; we expect *Sinochem* to turn *Ruhrgas*'s dictum into a holding." *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006).

Against this array of contrary precedent and analysis, Respondent seeks an absolute rule that "jurisdiction" must be definitively adjudicated first in all cases, because jurisdiction "[g]ives a [c]ourt the [a]uthority to [r]ule on [m]erits and [n]on-[m]erits [i]ssues." Resp. Br. at 9. That proposed rule—at least the "and non-merits issues" part of it—is completely at odds with this Court's precedent, including all of this Court's post-*Steel Co.* precedent in this area. That, perhaps, is why Respondent fails to even cite, let alone reconcile, such cases as *Tenet*, *Kowalski*, *Vermont Agency of Natural Resources*, and *Ortiz*, as well as *Moor v. Alameda County*, 411 U.S. 693 (1973), *Ellis v. Dyson*, 421 U.S. 426 (1975), and *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), all cited by Sinochem.

The judgment of the Third Circuit should be reversed.

## I. RESPONDENT'S ARGUMENTS IGNORE THIS COURT'S PRECEDENTS

1. In urging that a district court must conclusively establish jurisdiction before considering a *forum non conveniens* motion, Respondent entirely disregards the distinction *Steel Co.* and *Ruhrgas* drew between adjudication of merits issues prior to establishing jurisdiction, and dismissal of an action on threshold non-merits grounds. The Court has made abundantly clear that the bar on "hypothetical jurisdiction" refers only to "'assuming' jurisdiction for the purpose of deciding the merits." *Steel Co.*, 523 U.S. at 94. Thus, as Petitioner's opening brief (at 12-13) and the United States' Brief (at 11) have explained, the Court in so ruling reaffirmed its prior decisions in *Moor*, 411 U.S. at 715-16, where it approved the discretionary practice of declining to exercise pendent jurisdiction before ascertaining whether federal jurisdiction existed in the first place, and *Ellis*, 421 U.S. at 436, where the Court approved of courts abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), before determining whether there was a "case or controversy." This Court recognized that these decisions, among others, "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Steel Co.*, 523 U.S. at 101. Respondent, apparently unable to reconcile these cases with its absolutist position, cites neither *Moor* nor *Ellis*.

"It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585 (citing *Moor*, 411 U.S. at 715-16, and *Ellis*, 421 U.S. at 433-34). Thus, the Court of Appeals for the D.C. Circuit, in *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998), held that "a court that dismisses on . . . non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles." *Id.* at 255. This Court approvingly quoted this language from

*Papandreou* in *Ruhrgas*, 526 U.S. at 584-85, but elided the "*forum non conveniens*" language since only personal jurisdiction, and not *forum non conveniens*, was at issue there. In light of *Ruhrgas*'s reliance on *Papandreou*, and its post-*Ruhrgas* reaffirmance by that court in *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006), Respondent's brusque disapproval of *Papandreou* because it "was decided prior to . . . *Ruhrgas*" (Resp. Br. at 17, 21), is puzzling at best.

Similarly puzzling is Respondent's decision to ignore any decision rendered by this Court after *Ruhrgas*, including several cited in the opening brief. The only imaginable explanation for that tactic is that all of those decisions—including *Ortiz*, 527 U.S. 815, *Vt. Agency of Natural Resources*, 529 U.S. 765, *Kowalski*, 543 U.S. 125, and *Tenet*, 544 U.S. 1—contradict the inflexible, absolute rule that Respondent seeks. Since Respondent has chosen not to distinguish or even discuss those decisions, we will not repeat our (or the Solicitor General's) discussion of those decisions here, except to state the obvious: They demonstrate that Respondent's position is wrong, and that the Third Circuit erred. *See* Pet'r's Br. at 13-16; U.S. Br. at 10-12.

Finally, as noted above, the Seventh Circuit has now endorsed Sinochem's position: "[Judge Stapleton] maintained that jurisdiction is vital only if the court proposes to issue a judgment on the merits. *Ruhrgas* says as much, 526 U.S. at 584-85, though in dictum. . . . It seems to us the right approach; we expect *Sinochem* to turn *Ruhrgas*'s dictum into a holding." *Intec USA, LLC*, 467 F.3d at 1041.

2. In support of its position, Respondent relies on cases that are either helpful to Sinochem or are otherwise inapposite.

a. Respondent cites (at 10) *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374 (1937), for the proposition that "[n]either subject matter jurisdiction nor personal

jurisdiction may be lacking prior to a court proceeding to adjudicate a matter." That proposition is hardly novel, nor does it help Respondent. The Court in *Bryant* held that without personal jurisdiction, "the court is powerless to proceed to an *adjudication*." *Id.* at 382 (emphasis added). But, as Respondent then notes (at 10), this language was quoted favorably by the Court in *Ruhrgas*, 526 U.S. at 583-84, which went on to explain that the power of "adjudication" referred to in *Bryant* meant "[j]urisdiction *to resolve cases on the merits*," which "requires both . . . subject matter jurisdiction and . . . personal jurisdiction, so that the court's decision will bind [the parties]," *Ruhrgas*, 526 U.S. at 577 (emphasis added).

That is the critical distinction here. The "adjudication" that cannot occur without jurisdiction is "resolv[ing] cases on the merits." As so many decisions, including the post-*Ruhrgas* cases ignored by Respondent, hold, conclusively establishing jurisdiction is not a prerequisite for a court's ability "to act" on every issue other than jurisdiction. *See* Resp. Br. at 9. In fact, in *Bryant*, this Court held that because it was established that the district court had no personal jurisdiction over defendant in a removed case, the district court should have either remanded the case to a state court or dismissed the action. 299 U.S. at 381-82. Either action was within the court's discretion, and this Court agreed that remand was the "more appropriate of the alternatives." *Id.* at 382. Under Respondent's absolutist formulation of the rule, however, it is doubtful that the district court would have had the power to enter the "more appropriate" remand order.

b. Respondent's citations to broad statements in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) ("the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue"), and *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court may not proceed at all in any cause."), Resp. Br. at 8-10, are

unhelpful. Neither case came remotely close to addressing the question presented here.

As the Solicitor General has explained, *Gulf Oil*'s statement that "*forum non conveniens* can never apply if there is absence of jurisdiction" "is true enough when a court has already determined that jurisdiction or proper venue is lacking. At that point, there is no role for *forum non conveniens* to play." U.S. Br. at 18 (internal quotation marks omitted). But *Gulf Oil* did not answer the question of whether *forum non conveniens* can apply where jurisdiction is not necessarily "absen[t]," but just not conclusively determined. That is the question raised by this case. *See also* U.S. Br. at 18 ("the question presented [in *Gulf Oil*] was whether even a court that concededly *has* jurisdiction and is a proper venue could decline to exercise its jurisdiction on *forum non conveniens* grounds"). The "thoughtful analysis" recently offered by the district court for the Southern District of New York (Resp. Br. at 16 n.6) in *Turedi v. Coca-Cola*, __ F. Supp. 2d __, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), answers Respondent's absolutist position: "[T]he *Gilbert* Court's assumption that a court ruling on a *forum non conveniens* motion must have jurisdiction to do so makes no express pronouncement that the existence of jurisdiction must first be formally verified, or that the court's application of the doctrine must adhere to a prescribed decisional sequence following the disposition of any jurisdictional disputes. Nothing in *Gilbert* could be construed as explicitly enunciating such a rule." *Id.* at *8.[1]

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[1] In further support of its position, Respondent quotes language from the Wright & Miller treatise suggesting that *forum non conveniens* "does not come into play unless the court in which the action was brought has both subject matter and personal jurisdiction and is a proper venue." 15 CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE & PROCEDURE § 3828 (2d ed. 1986). However, as the United States' Brief explains, "[n]otably, that treatise provides no analysis to support the assertion, and

So, too, *McCardle*'s statement that "[w]ithout jurisdiction the court may not proceed at all in any cause," is not inconsistent with a rule allowing *forum non conveniens* to be decided before jurisdiction is conclusively determined. A dismissal on *forum non conveniens* grounds at the outset of litigation has exactly the same effect as a dismissal for lack of jurisdiction—the court does not "proceed at all" within that cause, but dismisses the case without ever touching on the merits.

Respondent nonetheless reads these broad statements in *Gulf Oil* and *McCardle* without regard to subsequent developments, such as this Court's cases expressly allowing flexibility in determining which threshold non-merits ground is more efficient or appropriate for dismissing a case. Again, Respondent's argument suffers from its unwillingness to even cite, let alone attempt to reconcile, this Court's decisions in this area—such as *Moor*, 411 U.S. at 715-16; *Ellis*, 421 U.S. at 436; *Ortiz*, 527 U.S. at 831; *Vt. Agency of Natural Resources*, 529 U.S. at 779; *Kowalski*, 543 U.S. at 129 & n.2; and *Tenet*, 544 U.S. at 6 n.4.

Respondent's view is logically unsound. It is a commonplace that all federal courts have jurisdiction to determine their own jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court

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no authority other than the language in *Gulf Oil*," which, as explained above, does not control this case. U.S. Br. at 19 n.6.

Furthermore, "[a]nother respected treatise concludes, to the contrary, that '[t]he Second and D.C. Circuits have the better view. Just as the Supreme Court rejected the view that subject matter jurisdiction must be decided first in favor of a more flexible rule, the Court is likely to reject the absolute view adopted by the [court of appeals] here.'" U.S. Br. at 19 & n.6 (quoting 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 111.90A, at 111-248.2-248.3 (3d ed. 2006)) (brackets in original, except first).

always has jurisdiction to determine its own jurisdiction."). So, too, it makes sense that a federal court likewise always has jurisdiction to decline that jurisdiction, whether the ground for declining jurisdiction lies in abstention doctrines (*see Ellis*, 421 U.S. at 436), other discretionary jurisdictional doctrines such as pendent jurisdiction (*see Moor*, 411 U.S. at 715-16), venue statutes (*see Leroy*, 443 U.S. at 180), or *forum non conveniens*. Just as the court can temporarily assume jurisdiction to ascertain whether jurisdiction exists, "the converse should also follow: that the courts should be able to exercise inherent authority as well to decline to inquire into their jurisdiction if, consistent with similar concerns about furthering justice and judicial economy, a more suitable and expeditious non-merits disposition is available." *Turedi*, 2006 WL 3187156, at *9; *see also id.* at *8 (*Gulf Oil*'s general statement does not control because "*forum non conveniens* derives from the courts' 'inherent power,' a source of jurisdiction that grants them discretion to decide their order of operations of discretionary questions") (citation omitted).[2]

3. Respondent agrees with Sinochem and the Third Circuit (but disagrees with the Fifth Circuit) that *forum non conveniens* is a "non-merits based" determination. Resp. Br. at 16-17. Yet Respondent does not come to grips with the consequence of that critical concession.

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[2] Respondent's position is at best inconsistent with respect to whether discretionary grounds for declining to exercise jurisdiction can be exercised before determining jurisdiction. At one point, Respondent agrees with Sinochem (*see* Pet'r's Br. at 17-21) that discretionary barriers to federal court may properly be decided before jurisdiction is decided: "Petitioner is correct that *Steel Co.* does not prohibit decisions on 'discretionary jurisdictional question[s].'" Resp. Br. at 14-15. But elsewhere in its brief, Respondent suggests a dichotomy between personal jurisdiction and *forum non conveniens*, because the former is "a question of law," but *forum non conveniens* "is not." Resp. Br. at 22-23.

a. Respondent agrees that a court may decide abstention or venue questions prior to conclusively establishing jurisdiction, Resp. Br. at 14-15, and, indeed, goes so far to say that "[i]t is entirely appropriate to rule on the venue matter" in a case removed to a federal court, "then allow the next court to deal with the issues of establishing jurisdiction." Resp. Br. at 15. But, as Sinochem explained in its opening brief (at 21-27), *forum non conveniens* is itself "a supervening venue provision," *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), and, even though better classified as a venue doctrine, it nonetheless "proceed[s] from a similar premise" as the abstention doctrines—that, "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). Given that *forum non conveniens* is of the same essential nature as venue and abstention, Respondent's failure to reconcile its absolutist position with *Leroy* or *Moor*—let alone explain in any convincing way why the result here should be different than in those cases, which endorse deciding venue or abstention *before* deciding jurisdiction—should be fatal to its proposed rule.[3]

b. Respondent is wise to disagree with the Fifth Circuit's holding in *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005), that *forum non conveniens*

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[3] In fact, even prior to this Court's holding in *Leroy*, this Court held in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), that a district court may transfer a case to another venue pursuant to 28 U.S.C. § 1406(a), which authorizes a district court to transfer a case filed in an improper venue "if it be in the interest of justice," whether or not the transferor court has personal jurisdiction over the defendant. *Goldlawr*, 369 U.S. at 465 (internal quotation marks omitted). And, subsequent to *Goldlawr*, Congress enacted 28 U.S.C. § 1631, which explicitly conferred upon the courts authority to order a transfer of venue "in the interest of justice" in a case in which the court "finds that there is a want of jurisdiction." *See* U.S. Br. at 19-20 (internal quotation marks omitted).

does present a merits issue. As Sinochem showed in its opening brief (at 23-24 & n.5), this Court has observed in several cases that a *forum non conveniens* decision is not a ruling on the merits, since it does not bear on the substantive right to recover, *American Dredging*, 510 U.S. at 454; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988). And the Solicitor General has properly noted in the United States' brief (at 13-14) that a dismissal on *forum non conveniens* grounds has no claim-preclusive effect, not even on a later procedural ruling. U.S. Br. at 14 (quoting *Parsons v. Chesapeake & Ohio Ry.*, 375 U.S. 71, 73-74 (1963): "'[A] prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a).'").

In sum, *forum non conveniens* is a non-merits ground for dismissal that may be considered at the outset of a case.

## II. RESPONDENT'S ARGUMENTS DO NOT RESPECT JUDICIAL ECONOMY, INTERNATIONAL COMITY, OR CONSTITUTIONAL AVOIDANCE

As Sinochem showed in its opening brief (at 27-36), *forum non conveniens* is particularly apt for consideration at the outset of a case based on considerations of efficiency, international comity and constitutional avoidance. The United States agrees. U.S. Br. at 25-30.

1. Disagreeing with Sinochem and the United States, Respondent contends (albeit admittedly without any statistical evidence) that because cases involving *forum non conveniens* motions "represent only a very small fraction of the cases on the federal court dockets," Resp. Br. at 24, courts would not have to devote significant additional resources to adjudicate jurisdiction before even considering *forum non conveniens* motions. Respondent misunderstands the proper inquiry, which should focus not on the number of cases where *forum non conveniens* is at issue, but what the

effective method of adjudicating this issue should be within the class of cases where *forum non conveniens* motions *are* brought. And in all events, in view of the proliferation of foreign litigation in the U.S. courts (Pet. at 22; Pet'r's Br. at 32), there is good reason to doubt Respondent's unsupported speculation that *forum non conveniens* implicates "only a very small fraction of the cases on the federal court dockets."

2. Respondent claims that consideration of the factors involved in deciding a *forum non conveniens* motion is "extensive and time consuming." Resp. Br. at 23. One need look no further than the docket in this case to see that this is not so: The district court was able to resolve the *forum non conveniens* question without the need for anything beyond briefing—a very efficient, and proper, way of disposing of this case.

Respondent seeks to make the case that other discretionary reasons for denying a federal-court audience to a case, such as improper venue, abstention, and "other bases raised by Petitioner" (Resp. Br. at 15), are appropriately addressed first, but that *forum non conveniens* is not. But Respondent offers no analysis to support a special treatment for *forum non conveniens*. And, indeed, in these other areas, which are highly analogous to *forum non conveniens* in meaningful ways, the Court's decisions only support Sinochem's position, not Respondent's. As the Solicitor General has explained in the case of pendent-claim jurisdiction (now codified as supplemental jurisdiction, *see* 28 U.S.C. § 1367), "in deciding whether to exercise jurisdiction over pendent state law claims, a court must assess factors similar to those considered in conducting a *forum non conveniens* analysis—*i.e.*, 'judicial economy, convenience and fairness to litigants'—that require it to make determinations regarding the complexity and predominance of the state claims at issue." U.S. Br. at 16 (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)). Indeed, this Court's explanation in *Gibbs* of the function of the pendent-jurisdiction doctrine, itself "a

doctrine of discretion," is equally applicable to *forum non conveniens*: "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." 383 U.S. at 726. Thus, it is highly relevant that this Court has endorsed the federal courts' power to decline pendent jurisdiction over state-law claims before decisively ascertaining whether a court has jurisdiction over those claims at all. *See Ruhrgas*, 526 U.S. at 585 (citing *Moor*, 411 U.S. 693); *see also* U.S. Br. at 16.

3. Respondent's efficiency concerns are premised on unusual hypothetical factual settings that are more appropriately dealt with in individual cases, not by virtue of a rule that deprives federal courts of the power to consider *forum non conveniens* motions at the outset in all cases.

a. Respondent fears that judicial economy would not be furthered if a court addresses *forum non conveniens* first, determines that a *forum non conveniens* dismissal is inappropriate, but ultimately finds that there is no jurisdiction. Resp. Br. at 14. In support, Respondent cites only a single example, the recent decision in *Intec*, where the Seventh Circuit went through the jurisdictional determination in addition to addressing *forum non conveniens*. But the very reason the *Intec* court felt obliged to perform both inquiries was because this Court has yet to definitively resolve the sequencing issue presented here. 467 F.3d at 1041 ("But to avoid the need for further proceedings should the Supreme Court affirm in *Sinochem*, we turn to subject-matter jurisdiction."). As noted above, the Seventh Circuit endorsed Sinochem's position in this case, not Respondent's proposed rule, *id.*, and if Sinochem's argument prevails here, courts faced with the same quandary as the *Intec* court will not have to go through both sets of analyses in the future.

b. Respondent's suggestion that adjudication of personal jurisdiction is more "direct, and the courts have leeway in deciding such a motion," whereas *forum non conveniens*

motions are "wasteful to the resources of the parties, and not just to a court," Resp. Br. 25, is again belied by this very case.

In seeking to advance this contention, Respondent attempts to make the *forum non conveniens* determination sound complex by referring to "affidavits from six different countries," *id.*, that Sinochem submitted to the district court here. What Respondent does not disclose, however, is that those affidavits—actually, declarations—were not inherently necessary to the *forum non conveniens* inquiry, but needed only to refute Respondent's assertion, made in its district-court briefing, that Chinese procedural laws on discovery are inferior to U.S. law. Nor does Respondent disclose that five of those six declarations were only one to one-and-a-half pages long, or that each merely set forth, pursuant to FED. R. CIV. P. 44.1, the content of the procedural laws of a variety of European nations demonstrating that those nations provide for significantly less opportunity for discovery than do Chinese court rules, yet that United States courts routinely extend comity to decisions of the courts of these European countries. Only one of those declarations, from Sinochem's Chinese admiralty lawyer Lu Min, was longer— five pages—and it addressed the relevant Chinese judicial procedures. *See* J.A. 10 (C.A. App. 119a-134a).[4]

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[4] Lu Min also submitted another declaration in response to MISC's motion for reconsideration covering these points in further detail, as well as addressing the Chinese High Court's ruling that had issued by the time of that briefing. C.A. App. 166a-170a. The total number of pages of Sinochem-offered declarations, all on foreign-court procedures, is 22 pages, including Lu Min's original declaration (C.A. App. 45a-48a) covering the procedural history of the Chinese action and touching, but only briefly, on Chinese admiralty court competence to hear such cases generally (C.A. App. 48a).

The district court ultimately concluded, based on other evidence furnished by declaration, that "while there seems to be some disagreement as to the extent of Chinese discovery and evidentiary

In any event, the district court did not find adjudication of *forum non conveniens* to be more complicated than the question of personal jurisdiction—the district court would have required further discovery, briefing, and perhaps even testimony to ascertain personal jurisdiction, whereas it was able to dismiss the case on *forum non conveniens* grounds without more than briefs and affidavits. *See* Pet. App. 60a, 67a.

c. In the end, Respondent's arguments about efficiency are better addressed not by a hard and fast rule prohibiting the consideration of a *forum non conveniens* motion before a conclusive determination of jurisdiction, but by the rule that Sinochem has proposed. There indeed may be cases where the personal-jurisdiction or subject-matter-jurisdiction inquiry is best decided first. But there also will be cases like this one, where it is plain that *forum non conveniens* is the better threshold inquiry. Sinochem's proposed rule leaves that determination up to the district court, which is best able to determine whether *forum non conveniens* presents a simple and cost-effective way of disposing of a case at the outset. The question here is not, as Respondent has redrafted it, "[w]hether a district court *should* establish jurisdiction before dismissing a suit on grounds of *forum non conveniens*" (Resp. Br. at i) (emphasis added); the only question for this Court is whether a district court has that power in the first place.

3. Respondent's international-comity arguments are curious, to say the least. Respondent equates international comity with "expect[ing] our own courts to undertake at least the level of work we are asking other courts to perform." Resp. Br. at 24. That is not comity at all. That is a recipe for

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practice relative to that in the United States, the Chinese system appears to have competent and orderly practice and procedure capably of justly addressing matters involving foreign entities." Pet. App. 68a n.11.

requiring dual-track litigation in the U.S. and in the foreign country, which is not only inefficient, but disrespectful of the foreign country—and it risks inconsistent judgments as well. Comity means deference and solicitude, not dueling court proceedings. *See, e.g., Am. Dredging Co.*, 510 U.S. at 464-67; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 131-35 (2005); Pet'r's Br. at 29-31.

As the Solicitor General has observed, the doctrine of *forum non conveniens* has the salutary benefit of allowing dismissal "without deciding difficult questions of jurisdiction, which often can turn on questions which could be very sensitive to the foreign government whose conduct is at issue." U.S. Br. at 2; *see also id.* at 30 n.13 (Respondent's rule "would deny courts the flexibility necessary to deal with cases that . . . present foreign affairs concerns."); *id.* at 27-30 (listing examples where a *forum non conveniens* dismissal would have avoided the resolution of issues with "sensitive foreign relations ramifications"). In fact, the Solicitor General has emphasized that the United States, in litigating abroad, also relies on *forum non conveniens* to obtain dismissals, and that adopting Respondent's position "could have an adverse impact on the United States when it raises that or similar non-merits grounds for dismissal in foreign litigation." U.S. Br. at 2. *See also Intec USA*, 467 F.3d at 1040 (respect for comity means that "[a]s a nation whose policy favors free international trade, the United States must be prepared *to trust* the judiciary of our partners, unless there are grounds to doubt the competence or honesty of the foreign judicial system") (emphasis added); Pet. App. 67a n.11 (the district court in this case expressed its "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter").

4. Finally, Respondent has no response to Sinochem's showing that the principle of constitutional avoidance is best served by dismissing a case on *forum non conveniens* grounds rather than engaging in a difficult jurisdictional

analysis that may force the court to "decide a question of constitutional law that it has not heretofore decided," such as the unique due process questions that so frequently arise where personal jurisdiction under state long-arm statutes is asserted. *Leroy*, 443 U.S. at 181; *see* Pet'r's Br. at 33-36; U.S. Br. at 27. Where those difficult constitutional questions arise, as in *Leroy* and this case, *forum non conveniens* provides a practical, alternative, non-constitutional, and non-merits ground for decision. As with so many of Sinochem's (and the Solicitor General's) showings, Respondent's answer is a deafening, and telling, silence.

## CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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No. 06-102

# In the Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,
PETITIONER

*v.*

MALAYSIA INTERNATIONAL SHIPPING CORPORATION

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*.

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# In the Supreme Court of the United States

No. 06-102

SINOCHEM INTERNATIONAL CO. LTD.,
PETITIONER

*v.*

MALAYSIA INTERNATIONAL SHIPPING CORPORATION

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

This case presents the question whether a federal district court must conclusively determine that it has jurisdiction over a case before it may dismiss the case under the *forum non conveniens* doctrine. The resolution of that question will have policy implications for the United States with respect to both domestic and foreign litigation.

The doctrine of *forum non conveniens* arises in the federal courts exclusively in the context of a request that the court defer to adjudication of the parties' dispute in the courts of a foreign nation. In many cases over the past several years, defendants in suits brought under the Foreign Sovereign Immunities Act of 1976

(FSIA), 28 U.S.C. 1602 *et seq.*, or Alien Tort Statute (ATS), 28 U.S.C. 1350, have sought dismissal on non-merits threshold grounds such as *forum non conveniens*, international comity, and the political question doctrine, in deference to resolution of the plaintiff's claim in the country where the wrong took place. On several occasions, the United States has appeared as amicus and argued that the courts may dismiss on such grounds without deciding difficult questions of jurisdiction, which often can turn on questions which could be very sensitive to the foreign government whose conduct is at issue. The United States has a significant interest in maintaining the federal courts' ability to avoid unnecessary adjudication in cases that, for example, may involve delay, burdensome or sensitive discovery, or examination of difficult legal issues.

The United States also invokes the doctrine of *forum non conveniens* on its own behalf as a party to litigation abroad. The doctrine is not unique to the United States (indeed, it did not originate here), but rather is incorporated into the law of a variety of countries. See *American Dredging Co.* v. *Miller*, 510 U.S. 443, 449-450 (1994). A holding by this Court that a court must conclusively establish jurisdiction before dismissing a case on *forum non conveniens* grounds could have an adverse impact on the United States when it raises that or similar non-merits grounds for dismissal in foreign litigation.

## STATEMENT

1. A federal court has discretion to dismiss a case under the common law doctrine of *forum non conveniens* when "an alternative forum has jurisdiction to hear [a] case," and "when trial in the chosen forum would establish . . . oppressiveness and vexation to a

defendant . . . out of all proportion to plaintiff's convenience," or when "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447-448 (1994) (quoting *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 (1981)). Dismissal on *forum non conveniens* grounds can reflect a "broad[] range of considerations, * * * most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (citing *Piper Aircraft*, 454 U.S. at 241, 257-261; *id.* at 261-262 (Stevens, J., dissenting), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509, 511 (1947)). In light of the federal venue transfer statute, which authorizes district courts to transfer cases "in the interest of justice * * * to any other district or division where it might have been brought," 28 U.S.C. 1404(a), "the federal doctrine of *forum non conveniens* has continuing application only in cases in which the alternative forum is abroad." *American Dredging*, 510 U.S. at 449 n.2. Cases involving foreign parties, foreign law, and acts in foreign countries are therefore the typical candidates for *forum non conveniens* dismissals.

2. Petitioner Sinochem International Co. Ltd., a Chinese company, purchased a large number of steel coils from an American firm that is not a party to this action. Pet. App. 3a. Under the terms of the purchase contract, the seller was to receive payment only if a valid bill of lading was issued certifying that the coils had been loaded for shipment on or before April 30, 2003. *Id.* at 3a-4a. The coils were shipped from Philadelphia to China aboard a vessel owned by respondent Malaysia International Shipping Corp., a Malaysian company. *Id.*

at 4a, 49a. A bill of lading, dated April 30, 2003, was issued in Philadelphia acknowledging the loading of the coils. *Ibid.*

In June 2003, petitioner filed a petition in the Chinese admiralty court for presentation of a maritime claim against respondent and for arrest of the vessel when it arrived in China. Pet. App. 5a. Petitioner alleged that respondent fraudulently backdated the bill of lading, and in fact had not loaded the shipment until May. *Id.* at 5a, 38a. The Chinese admiralty court granted the petition and, on the court's order, the vessel was subsequently arrested at the Huangpu Port. *Id.* at 5a. Respondent posted a $9 million bond to secure its release. *Ibid.*

Petitioner subsequently filed a complaint against respondent in the Chinese admiralty court asserting that the bill of lading had been falsified and that it had been injured as a result. Pet. App. 6a. Respondent moved to dismiss on jurisdictional grounds, but the admiralty court denied the motion and its holding was affirmed on appeal by the Guangdong Higher People's Court. *Ibid.* That suit apparently remains pending in China.

3. Shortly after the ship was arrested, respondent filed its own suit against petitioner in the United States District Court for the Eastern District of Pennsylvania. Pet. App. 5a. Respondent claims that the allegations in petitioner's petition to the Chinese admiralty court for arrest of the vessel constituted negligent misrepresentations regarding the shipping vessel's fitness and suitability and that respondent was injured by the delay due to the arrest of the vessel. See *id.* at 5a-6a.

Petitioner moved to dismiss the suit in district court on several grounds, including lack of subject matter ju-

risdiction, lack of personal jurisdiction, *forum non conveniens*, and principles of international comity. Pet. App. 7a. The district court first determined that it possessed subject matter jurisdiction under 28 U.S.C. 1333, which confers jurisdiction on the district courts over admiralty and maritime matters. Pet. App. 51a-54a. The court next concluded that it did not have personal jurisdiction over petitioner under Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. §§ 5301 *et seq.* (West 2004), but suggested that limited discovery might reveal that personal jurisdiction could be established under Fed. R. Civ. P. 4(k)(2). Pet. App. 55a-59a; *id.* at 59a-63a.

The district court did not allow discovery or decide whether it had personal jurisdiction over petitioner, however, because it concluded that dismissal was warranted under the doctrine of *forum non conveniens*. Pet. App. 63a-69a; *id.* at 40a-47a (denial of Rule 59(e) motion). The court concluded that the parties' dispute could be resolved adequately and more easily in the Chinese courts. *Id.* at 64a-65a; *id.* at 42a-44a. It further concluded that the interests of the United States were not implicated in the dispute. *Id.* at 65a-67a; *id.* at 44a-47a. Although the choice-of-law clause in the bill of lading itself called for the application of United States law, the district court found the purchase contract's choice of Chinese law to be more apposite. *Id.* at 66a-67a; *id.* at 46a. And while the cargo had been loaded in the United States, the actual subject matter of the dispute—involving the arrest of a foreign ship in foreign waters pursuant to an order of a foreign court—was purely foreign. *Id.* at 67a.

4. A divided panel of the court of appeals vacated and remanded the case for a conclusive determination whether the district court had personal jurisdiction over

petitioner. Pet. App. 3a-36a. According to the majority (which agreed that there was subject matter jurisdiction), the district court could not dismiss the case on *forum non conveniens* grounds unless and until it fully established that it had both subject matter and personal jurisdiction. *Id.* at 3a-32a.

The majority relied on two main rationales. First, it reasoned that "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue." Pet. App. 21a. According to the majority, a court cannot abstain from exercising jurisdiction under the *forum non conveniens* doctrine unless it establishes that it actually has such jurisdiction in the first place. *Id.* at 21a-22a (citing *Gulf Oil, supra*).

Second, the majority relied on this Court's holding in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), which instructs that a court may not decide the merits of a case before establishing that it has subject matter jurisdiction. Pet. App. 17a, 26a. According to the majority, a court dismissing for *forum non conveniens* before finding personal jurisdiction would be exercising "hypothetical jurisdiction" in violation of *Steel Co.* See *id.* at 26a. The panel majority acknowledged that this Court had clarified *Steel Co.* in *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), by holding that a court could dismiss a case on "non-merits grounds such as personal jurisdiction" before finding subject matter jurisdiction, *id.* at 584 (internal quotation marks, alterations and citation omitted), and the court of appeals further determined that *forum non conveniens* constitutes a non-merits ground for dismissal. Pet. App. 17a, 19a-21a. Nonetheless, the majority concluded that

subject matter and personal jurisdiction must always be resolved before non-jurisdictional questions such as *forum non conveniens*. *Id.* at 22a-32a.

The majority acknowledged that its view was in conflict with those of the Second and District of Columbia Circuits. See Pet. App. 24a-26a (citing *In re Arbitration Between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-498 (2d Cir. 2002); *In re Minister Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)). The court found the contrary position of the Seventh and Ninth Circuits to be more persuasive. See Pet. App. 23a-24a, 29a (citing *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 800 n.3 (9th Cir. 2001), aff'd in part, cert. dismissed in part, 538 U.S. 468 (2003); *Kamel* v. *Hill-Rom Co.*, 108 F.3d 799, 805 (7th Cir. 1997)).[1]

Judge Stapleton dissented. Pet. App. 32a-36a. In his view, *Ruhrgas* permits a court to dismiss a case on a non-merits ground such as *forum non conveniens* before deciding whether it has jurisdiction. *Id.* at 33a-36a. He saw no reason why a court could not dismiss a case after concluding that even if jurisdiction existed the court would decline to exercise it. *Ibid.*

## SUMMARY OF ARGUMENT

The court of appeals mistakenly held that this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), "dictate" the conclusion

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[1] The Seventh Circuit has called into question the Third Circuit's characterization of *Kamel*. In *Intec USA, LLC* v. *Engle*, No. 06-1117, 2006 WL 3093644 (Nov. 2, 2006), the Seventh Circuit stated: "Unlike the majority in *Sinochem*, we do not read *Kamel* as committing this court to a rule that subject-matter jurisdiction always must be resolved ahead of *forum non conveniens*." *Id.* at *2.

that district courts "must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits." Pet. App. 26a. In *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), this Court rejected that kind of inflexible approach, explaining that "a federal court [may] choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585. Permissible threshold grounds include both mandatory jurisdictional grounds for dismissal, such as personal jurisdiction, *id.* at 584-585, and discretionary, non-jurisdictional bases for dismissal, such as abstaining from the adjudication of pendent state law claims, *id.* at 585.

The doctrine of *forum non conveniens* is a similar non-merits, threshold issue. A dismissal on *forum non conveniens* grounds does not decide the merits of the underlying case, but rather, like a dismissal based on improper venue, holds only that there is a more appropriate forum for litigating the parties' dispute. Thus, just as a case may be transferred for improper venue by a court that lacks (or has not decided whether it has) personal jurisdiction over the defendant, see *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465-466 (1962), it may similarly be dismissed on *forum non conveniens* grounds. By dismissing a claim in favor of adjudication in another forum before establishing its own jurisdiction, a court does not exercise hypothetical "law-declaring power" in the way that *Steel Co.* held would be impermissible.

Allowing a court to choose among threshold, non-merits bases for dismissal enables it to avoid opining unnecessarily on legal issues that may be more difficult or time-consuming, including novel issues and those with constitutional dimensions. Moreover, a rule that required courts to resolve jurisdictional issues before dis-

missing on *forum non conveniens* grounds could largely negate the benefits of the doctrine, by subjecting defendants to the very litigation burdens—such as jurisdictional discovery, especially in an inconvenient forum—that the doctrine is intended to avoid. Abroad, the United States as a defendant would seek to avoid such burdens. In our own courts, suits that involve activities abroad by foreign corporations, that are against foreign sovereigns, or that challenge the conduct of foreign governments can be quite sensitive. When appropriate, dismissal on *forum non conveniens* grounds prior to resolving the jurisdictional inquiry could allow the court to avoid creating unnecessary foreign relations difficulties.

## ARGUMENT

### A FEDERAL COURT MAY DISMISS A CASE ON *FORUM NON CONVENIENS* GROUNDS WITHOUT FIRST DETERMINING THAT IT HAS JURISDICTION

In *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court reiterated the long-standing "requirement that jurisdiction be established as a threshold matter." *Id.* at 94. "For a court to pronounce upon the merits when it has no jurisdiction to do so," the Court explained, "is, by very definition, for a court to act ultra vires." *Id.* at 101-102. Only a year later, however, the Court unanimously clarified that a federal court may "choose among threshold grounds for denying audience to a case on the merits." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). The doctrine of *forum non conveniens* is one such non-merits threshold ground upon which a court may dismiss a suit before resolving disputed questions regarding the court's jurisdiction "to pronounce upon the merits." *Steel Co.*, 523 U.S. at 101.

### A. A Court Does Not Exceed Its Authority By Dismissing A Suit On A Threshold, Non-Merits Basis Before Establishing Its Jurisdiction

The key holding of *Steel Co.* was its rejection of the practice of "'assuming' jurisdiction for purpose of deciding *the merits*" because doing so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." 523 U.S. at 94 (emphasis added). See *Ruhrgas*, 526 U.S. at 583 ("*Steel Co.* held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers *the merits* of a case.") (emphasis added); *id.* at 577 ("Jurisdiction to resolve cases on the merits requires both" subject matter jurisdiction and personal jurisdiction over the parties "so that the court's decision will bind them."). In contrast, there is no similar problem of *ultra vires* action when a court *declines* to adjudicate the merits of a case without first completing its jurisdictional inquiry. When a court dismisses on non-merits grounds before ascertaining its jurisdiction, it "makes no assumption of law-declaring power that violates the separation of powers." *Id.* at 584-585 (citation omitted). Such acts of judicial abnegation of the power to decide are quite different from the judicial arrogation of the power to resolve a case on the merits.

The Court recognized in *Steel Co.* and reiterated in *Ruhrgas* that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, * * * or abstain under *Younger* v. *Harris*, 401 U.S. 37 (1971), without deciding whether the parties present a case or

controversy." *Ruhrgas*, 526 U.S. at 585 (citing *Steel Co.*, 523 U.S. at 100-101 n.3, *Moor* v. *County of Alameda*, 411 U.S. 693, 715-716 (1973), and *Ellis* v. *Dyson*, 421 U.S. 426, 433-434 (1975)). Indeed, two Justices in the *Steel Co.* majority emphasized that "the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'" 523 U.S. at 110-111 (O'Connor, J., joined by Kennedy, J., concurring) (quoting *Norton* v. *Mathews*, 427 U.S. 524, 532 (1976)).

More recently, in *Tenet* v. *Doe*, 544 U.S. 1 (2005), the Court ruled that it could address the question whether respondents' claims were barred under *Totten* v. *United States*, 92 U.S. 105 (1876), which held that suits against the United States based on secret espionage agreements should not proceed, without first determining whether the district court lacked jurisdiction over the suit because the Tucker Act, 28 U.S.C. 1491, granted the Court of Federal Claims exclusive jurisdiction over respondents' claims. 544 U.S. at 6-7 n.4. The Court assumed, without deciding, that "this Tucker Act question is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim." *Id.* at 6 n.4. Nonetheless, the Court determined that "application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger* v. *Harris* * * * or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." *Id.* at 6-7 n.4.[2] See also *Vermont*

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[2] In support of its reference to the "prudential standing doctrine" as presenting a threshold issue for those purposes, the Court cited

*Agency of Natural Res.* v. *Stevens*, 529 U.S. 765, 779 (2000) (holding that the Court could, consistent with *Steel Co.*, decide whether a State qualifies as a "person" subject to suit under the False Claims Act, 31 U.S.C. 3729 *et seq.*, before resolving whether the State was immune from suit under the Eleventh Amendment).

As we explain below, the doctrine of *forum non conveniens* presents a similar non-merits ground for dismissal that can be decided at the threshold before the court resolves difficult questions of jurisdiction.

### B. *Forum Non Conveniens* Is A Threshold, Non-Merits Ground For Dismissal

1. In *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994), the Court characterized the doctrine of *forum non conveniens* as "nothing more or less than a supervening venue provision." *Id.* at 453. Thus, dismissal of a case under the doctrine of *forum non conveniens* "goes to process rather than substantive rights." *Ibid.* Notably, the court of appeals in this case also recognized that a dismissal for *forum non conveniens* is "not merits based." Pet. App. 19a-21a. That aspect of its decision is clearly correct.

A dismissal on *forum non conveniens* grounds reflects a determination that the merits should be litigated

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*Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004), in which the Court assumed Article III standing in order to "address the alternative threshold question" whether attorneys had third-party standing as a prudential matter to raise the rights of hypothetical indigents to challenge a procedure for appointing appellate counsel. See *Tenet*, 544 U.S. at 7 n.4; see also *Steel Co.*, 523 U.S. at 97 n.2 (stating that a statutory standing question can be given priority over an Article III question, citing cases discussed in Justice Stevens' dissenting opinion, *id.* at 115-117); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (following *Steel Co.* on that point).

in *another*, more convenient forum. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 256 (1981) (recognizing that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient"). Necessarily, therefore, a district court's dismissal on *forum non conveniens* grounds does "not resolve the merits" of the claim dismissed. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 148 (1988). See also Fed. R. Civ. P. 41(b) (expressly providing that a dismissal for improper venue is not considered an "adjudication upon the merits"); *American Dredging*, 510 U.S. at 453-454 (holding that the doctrine of *forum non conveniens* "is one of procedure rather than substance" that "does not bear upon the substantive right to recover" under federal maritime law).

Because a *forum non conveniens* dismissal is not merits-based, a dismissal on that ground has no claim-preclusive effect. In *Chick Kam Choo*, for example, this Court held that the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. 2283, did not authorize a federal court to enjoin litigation in state court of a claim the federal court had dismissed on *forum non conveniens* grounds after concluding that it should be litigated in Singapore. 486 U.S. at 148. The Court explained that the federal court's *forum non conveniens* dismissal did "not resolve the merits" of the claim. *Ibid.*

In fact, as *Chick Kam Choo* makes clear, because the *forum non conveniens* doctrine furnishes a procedural rule of the forum, a dismissal on that basis does not even have issue-preclusive effect vis-a-vis another forum. Thus, in *Chick Kam Choo*, "the only issue decided" by the federal court's *forum non conveniens* dismissal was that the plaintiff's "claims should be dismissed under the federal *forum non conveniens* doctrine," and not

"whether Texas courts, which operate under a broad 'open courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit." 486 U.S. at 148. Likewise, "a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a)." *Parsons* v. *Chesapeake & Ohio Ry.*, 375 U.S. 71, 73-74 (1963).[3]

2. The court of appeals also correctly concluded (Pet. App. 18a-20a) that the mere fact that a court's application of the *forum non conveniens* doctrine may require it to refer to the merits of the claim does not mean that the doctrine is merits-based for purposes of *Steel Co.*

As the court of appeals noted (Pet. App. 18a-19a), at least one circuit has concluded that *Steel Co.* requires addressing personal jurisdiction before *forum non conveniens* based on its reading of this Court's decision in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988). See *Dominguez-Cota* v. *Cooper Tire & Rubber Co.*, 396 F.3d 650, 653 (5th Cir. 2005). In particular, the Fifth Circuit relied on a passage in *Biard* stating that a *forum non*

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[3] A dismissal on *forum non conveniens* grounds might have issue-preclusive effect within the same jurisdiction. See *Vasquez* v. *Bridgestone/Firestone, Inc.*, 325 F.3d 665, 678 (5th Cir. 2003). But even that is not clear and in any event that would not undermine the conclusion that *forum non conveniens* is a threshold, non-merits determination. A dismissal for lack of personal jurisdiction would also have issue-preclusive effect, see *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 524-527 (1931), yet this Court has made clear that that fact does not prevent a court from dismissing for lack of personal jurisdiction before deciding whether it has subject-matter jurisdiction. See *Ruhrgas*, 526 U.S. at 585-586. Indeed, even a ruling on subject matter jurisdiction can have issue-preclusive effect. See *Ins. Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982).

*conveniens* ruling is not "completely separate from the merits of the action." *Id.* at 653 (quoting *Biard*, 486 U.S. at 527). However, *Biard* held only that a district court's denial of a motion to dismiss on *forum non conveniens* grounds is not immediately appealable under the collateral order doctrine. 486 U.S. at 527. The Court reasoned that some, though not all, of the factors that a court will consider in ruling on a *forum non conveniens* motion—such as what evidence will be relevant to the plaintiff's claim or any defenses—"will substantially overlap factual and legal issues of the underlying dispute." *Id.* at 529.

The fact that a court undertaking a *forum non conveniens* determination may, depending on the circumstances of the particular case, have to identify the issues presented by a case and the evidence that would be relevant to adjudicating those issues does not mean that a *forum non conveniens* dismissal is merits-based for purposes of *Steel Co.* See *Lacey* v. *Cessna Aircraft Co.*, 932 F.2d 170, 181 (3d Cir. 1991) (*forum non conveniens* motion requires no more than that the court "delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof"). Other threshold inquiries that the Court has identified as "non-merits" can also require a court at least to take a peek at the merits.[4]

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[4] Nor is there any necessary relationship between issues that are threshold issues for *Steel Co.* purposes and issues that are appealable under the collateral order doctrine. A refusal to dismiss on grounds of subject matter or personal jurisdiction would not be immediately appealable, whereas other issues, such as a qualified immunity defense, are immediately appealable but clearly involve adjudication on the merits.

Ruling on a motion to dismiss for lack of personal jurisdiction, for example, can require a court to determine whether a defendant's contacts with the forum relate to the claim advanced by the plaintiff. See, *e.g.*, *Ruhrgas*, 526 U.S. at 581 n.4 (noting that the district court's holding that it lacked personal jurisdiction was based on its conclusion "that Marathon had not shown that Ruhrgas pursued the alleged pattern of fraud and misrepresentation during the Houston meetings"). Likewise, in deciding whether to exercise jurisdiction over pendent state law claims, a court must assess factors similar to those considered in conducting a *forum non conveniens* analysis—*i.e.*, "judicial economy, convenience and fairness to litigants"—that require it to make determinations regarding the complexity and predominance of the state claims at issue. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Nonetheless, this Court has made clear that the court may decline to exercise pendent jurisdiction over state claims before resolving whether it would actually have jurisdiction over those claims at all. See *Ruhrgas*, 526 U.S. at 585.

Because a *forum non conveniens* motion presents a threshold, non-merits issue that does not require the court to assume "law-declaring power," *Ruhrgas*, 526 U.S. at 584 (citation omitted), a court may dismiss on that basis before resolving questions regarding its jurisdiction.[5]

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[5] For the reasons already stated, a dismissal is permissible in appropriate cases on *forum non conveniens* grounds before the court ascertains either subject matter or personal jurisdiction. That conclusion is even more strongly compelled with respect to personal jurisdiction because, while subject matter jurisdiction is nonwaivable and "must be policed by the courts on their own initiative even at the highest level," personal jurisdiction may be waived by a party.

### C. The Doctrine of *Forum Non Conveniens* Does Not Independently Require That A Court First Ascertain Its Own Jurisdiction Before Dismissing A Suit In Favor Of An Alternative Forum

1. a. Although the court of appeals correctly determined that *forum non conveniens* is a "non-merits procedural issue," Pet. App. 21a, it nonetheless held that a court must find that it possesses jurisdiction before it can dismiss on *forum non conveniens* grounds, because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue," *ibid.* (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947)). That is so, the court reasoned, because "if [a court] has no jurisdiction *ipso facto* it cannot abstain from the exercise of it." *Id.* at 25a. There is, however, no rule, constitutional or otherwise, that prevents a court from dismissing a case on the ground that *if* it had jurisdiction, it would decline to exercise that jurisdiction.

As previously noted, this Court has expressly upheld the courts' authority to "decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction," *Ruhrgas*, 526 U.S. at 585, or to invoke "the abstention doctrine of *Younger* v. *Harris*" before addressing jurisdiction. *Tenet*, 544 U.S. at 6-7 n.4. There is no valid

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*Ruhrgas*, 526 U.S. at 583-584. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180 (1979) (holding that because both personal jurisdiction and venue are waivable, "when there is a sound prudential justification for doing so, * * * a court may reverse the normal order of considering personal jurisdiction and venue").

basis for applying a different rule when a court abstains on the basis of *forum non conveniens*.

The court of appeals' analysis was based on its misreading of a statement in *Gulf Oil* that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." Pet. App. 21a (footnote omitted; quoting *Gulf Oil*, 330 U.S. at 504). That statement is true enough when a court has already determined that jurisdiction or proper venue is lacking. At that point, there is no role for *forum non conveniens* to play. But *Gulf Oil* did not present the question whether a court could dismiss on *forum non conveniens* grounds before definitively ascertaining its own jurisdiction. Rather, the question presented was whether even a court that concededly *has* jurisdiction and is a proper venue could decline to exercise its jurisdiction on *forum non conveniens* grounds. Thus, the statement on which the court of appeals relied was made in response to an argument that because the district court possessed jurisdiction, and venue was proper, the court was required to adjudicate the dispute. See 330 U.S. at 504 (explaining that the fact that federal statutes "empower [the district] court to entertain" the suit "does not settle the question whether it must do so"). It was in that context that the Court explained that the existence of jurisdiction in the first forum does not preclude application of *forum non conveniens* because "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant" can be sued. *Id.* at 506-507. While in that sense the doctrine "presupposes" the propriety of the first forum, the Court said nothing about a court's authority to presume, rather than definitively decide, the propriety of the first forum, or to dismiss on the ground that

"even if" the first forum does have jurisdiction, that court would decline to exercise its jurisdiction in favor of a more convenient venue. *American Dredging*, 510 U.S. at 448 (doctrine allows court to dismiss case "*even if* jurisdiction and proper venue are established") (emphasis added).[6]

b. There is nothing unique about *forum non conveniens* and other venue-type determinations that require that they—unlike other non-merits, threshold issues—can be decided only after the court has ascertained its jurisdiction. To the contrary, in other contexts, this Court has held that a court may make venue determinations without first ensuring that it possesses jurisdiction. For example, courts can, and sometimes should, dismiss a case on venue grounds before addressing the question of personal jurisdiction, such as when the jurisdictional question poses a difficult constitutional issue. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180-181 (1979) (reversing judgment on the ground that the district court lacked venue, without reaching the question of personal jurisdiction).

In *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962), moreover, the Court held that a district court may transfer the case to another venue pursuant to 28 U.S.C.

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[6] In support of its conclusion, the court of appeals cited (Pet. App. 23a) 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3828, at 287 (2d ed. 1986). Notably, that treatise provides no analysis to support the assertion, and no authority other than the language in *Gulf Oil* discussed above. Another respected treatise concludes, to the contrary, that "[t]he Second and D.C. Circuits have the better view. Just as the Supreme Court rejected the view that subject matter jurisdiction must be decided first in favor of a more flexible rule, the Court is likely to reject the absolute view adopted by the [court of appeals] here." 17 James Wm. Moore, *Moore's Federal Practice* § 111.90A at 111-248.2-248.3 (3d ed. 2006).

1406(a), which authorizes a district court to transfer a case filed in an improper venue "if it be in the interest of justice," whether or not the transferor court has personal jurisdiction over the defendant. See 369 U.S. at 466 (Section 1406(a) authorizes transfer of a case "whether the court in which it was filed had personal jurisdiction over the defendants or not"). Subsequent to *Goldlawr*, Congress provided courts express statutory authority to order a transfer of venue "in the interest of justice" in a case in which the court "finds that there is a want of jurisdiction." 28 U.S.C. 1631.

Similarly, a majority of circuits have held that, like a transfer under Section 1406(a), a transfer under 28 U.S.C. 1404(a), which authorizes transfer for reasons of convenience even when venue is proper in the transferor court, can also be made even if the transferor court lacks personal jurisdiction over the defendant. See, *e.g.*, *Fort Knox Music Inc.* v. *Baptiste*, 257 F.3d 108, 112 (2d Cir. 2001); *Myelle* v. *American Cyanamid Co.*, 57 F.3d 411, 413-414 (4th Cir. 1995); *Follette* v. *Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1238 (8th Cir. 1994); *Coté* v. *Wadel*, 796 F.2d 981, 985 (7th Cir. 1986); *United States* v. *Berkowitz*, 328 F.2d 358, 361 (3d Cir.), cert. denied, 379 U.S. 821 (1964); *Koehring Co.* v. *Hyde Constr. Co.*, 324 F.2d 295, 297-298 (5th Cir. 1963). Ironically, three of the circuits that have applied *Goldlawr* to Section 1404(a)—the Third, Fifth, and Seventh—are among those (including the court of appeals in this case) that have held that *forum non conveniens* dismissals require that a court first establish its jurisdiction. See Pet. App. 16a-17a (citing *Dominguez-Cota* v. *Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005); and *Kamel* v. *Hill-Rom Co.*,

108 F.3d 799 (7th Cir. 1997)).[7] None of those decisions concerning *forum non conveniens* has discussed, much less distinguished, the respective circuit's contrary rule with respect to Section 1404(a).[8]

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[7] But see *Intec USA, LLC* v. *Engle*, No. 06-1117, 2006 WL 3093644, at *2 (7th Cir. Nov. 2, 2006) (disagreeing with the Third Circuit's reading of *Kamel* and adopting the dissenting views of Judge Stapleton (discussed at p. 7, *supra*)).

[8] Two courts of appeals have held, based on an analysis similar to that of the Third Circuit in this case, that a court cannot transfer a case under Section 1404(a) if it lacks personal jurisdiction over the defendant. See *Albion* v. *YMCA Camp Letts*, 171 F.3d 1, 2 (1st Cir. 1999); *Martin* v. *Stokes*, 623 F.2d 469, 474 & n.7 (6th Cir. 1980). Cf. *McFarlane* v. *Esquire Magazine*, 74 F.3d 1296, 1301 (D.C. Cir.) (noting issue, but declining to resolve it), cert. denied, 519 U.S. 809 (1996); *Nelson* v. *International Paint Co.*, 716 F.2d 640, 643 n.4 (9th Cir. 1983) (same). The Tenth Circuit has adopted a different approach, holding that when a court lacks personal jurisdiction, "the proper course of action since the enactment of 28 U.S.C. § 1631 is to transfer pursuant to that statute." *Viernow* v. *Euripides Dev. Corp.*, 157 F.3d 785, 793 (1998).

We note one significant difference between transfers under Section 1404(a) and dismissals on *forum non conveniens* grounds. When a case brought under a federal court's diversity jurisdiction is transferred under Section 1404(a), the transferee court is required to apply the law of the transferor court, see *Ferens* v. *John Deere Co.*, 494 U.S. 516, 523 (1990); *Van Dusen* v. *Barrack*, 376 U.S. 612, 635-637 (1964), whereas a case transferred under Section 1631 for lack of jurisdiction is governed by the law of the transferee court, see 28 U.S.C. 1631 (after transfer "the action * * * shall proceed as if it had been filed in * * * the court to which it is transferred"). That difference was one reason why the Tenth Circuit concluded that transfer under Section 1631, rather than 1404(a), is appropriate when the transferor court lacks jurisdiction. *Viernow*, 157 F.3d at 793-794. Because of the different effect of transfers under Section 1404(a) and Section 1631, a transferor court sitting in diversity may need to decide a dispute concerning its jurisdiction in order to know which section is the proper basis for its transfer. That problem is not presented with respect to a dismissal on

The district court's discretionary determination in this case that it would not exercise jurisdiction over the parties' dispute, even if jurisdiction existed, is certainly no more problematic than the analogous venue-related determinations that this Court and Congress have expressly endorsed. If anything, altogether declining to exercise jurisdiction that a court might have is less problematic than affirmatively exercising authority to transfer a case when the court has already determined that it lacks jurisdiction, as is permitted under Section 1406(a), as construed in *Goldlawr*, and Section 1631.

2. Contrary to the understanding of the court of appeals (Pet. App. 23a), this Court, when it affirmed the Ninth Circuit's decision in *Patrickson* v. *Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), aff'd in part, cert. dismissed in part, 538 U.S. 468 (2003), did not "inferentially" determine that "*forum non conveniens* dismissals are invalid if the district court does not have subject matter jurisdiction."

In *Patrickson*, two Israeli corporate defendants removed a state tort suit to federal court, each claiming to be an "agency or instrumentality" of the Israeli government entitled to the protections of the FSIA, 28 U.S.C. 1603(a). 251 F.3d at 798, 805. The district court upheld its jurisdiction and dismissed the suit on *forum non*

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*forum non conveniens* grounds. In *Piper Aircraft*, the Court specifically held that the reasoning of *Van Dusen* does not apply to *forum non conveniens*. 454 U.S. at 253. Under *forum non conveniens*, the case is dismissed, rather than transferred, and the foreign jurisdiction will decide for itself what law to apply, whether or not the first court had jurisdiction. See *id.* at 247 ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.").

*conveniens* grounds. *Id.* at 798. The Ninth Circuit reversed on the question of jurisdiction and directed that the case be remanded to state court. *Id.* at 808-809. The court of appeals declared in a footnote, without analysis, that "federal courts may decide [the *forum non conveniens*] issue only if we have jurisdiction over the case." *Id.* at 800 n.3. On review of the Ninth Circuit's decision, this Court did not address that issue. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003); see also Pet. App. 35a n.26 (Stapleton, J., dissenting). The questions on which the Court granted certiorari involved only the proper construction of the "agency or instrumentality" provision of the FSIA. See 538 U.S. at 472. The Court affirmed the Ninth Circuit, concluding that the Israeli defendants were not entitled to invoke the FSIA. *Id.* at 480. The Court did not discuss in any way whether the court of appeals or district court could have addressed *forum non conveniens* before addressing jurisdiction.[9]

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[9] The Ninth Circuit's reversal of the *forum non conveniens* dismissal in *Patrickson* may have been correct for a reason wholly separate from the question presented in this case. The order of the district court dismissing the case on *forum non conveniens* grounds had conditioned dismissal on the defendants' waiving certain defenses to suit against them in the courts of the plaintiff's "home country or in the country in which his injury occurred." Pet. App. at 77a, *Dole Food Co.* v. *Patrickson*, *supra* (No. 01-593). Assuming, as we urge, that a court can dismiss on *forum non conveniens* grounds before ascertaining its jurisdiction, it would be a different question whether a court could condition such a dismissal, as the district court did in *Patrickson*, without first deciding that the court had authority over the defendant. See *In re Minister Papandreou*, 139 F.3d 247, 256 n.6 (D.C. Cir. 1998) (holding that no conditions can be placed on such a dismissal). But see *Kryvicky* v. *Scandinavian Airlines Sys.*, 807 F.2d 514, 516 (6th Cir. 1986) (permitting conditional dismissal without ascertaining jurisdiction); *Turendi* v. *Coca-Cola Co.*, No. 05 Civ. 9635, 2006 WL 3187156, at *21 n.2 (S.D.N.Y. Nov. 2, 2006) (knowing whether the defendant is

Although this Court did not in *Patrickson* endorse the part of the Ninth Circuit's ruling regarding *forum non conveniens* dismissals, the Court did, in *Ruhrgas*, quote approvingly from the principal appellate case on the other side of the debate, *In re Minister Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). In *Papandreou*, the D.C. Circuit emphasized that "[w]hat is beyond the power of courts lacking jurisdiction is adjudication on the merits, the act of deciding the case." 139 F.3d at 255. The court held that "abstention from the exercise of jurisdiction" on the ground of *forum non conveniens* "is as merits-free as a finding of no jurisdiction," and thus presented a proper non-merits, threshold basis for dismissing a case prior to establishing subject matter jurisdiction. *Ibid.* In *Ruhrgas*, this Court approvingly cited the analysis in *Papandreou* that a "court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers." 526 U.S. at 584-585 (quoting *Papandreou*, 139 F.3d at 255); see *Tenet*,

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willing to waive a limitations defense "may * * * be necessary to the forum non conveniens analysis itself"). This case does not involve a conditional dismissal, so the Court need not address that issue.

In his dissenting opinion (Pet. App. 35a n.26), Judge Stapleton offered another basis for distinguishing *Patrickson*. In his view, because (as determined by the Ninth Circuit) that case had been improperly removed from state court, federalism and comity considerations called for a remand to state court to resolve the *forum non conveniens* issue. Because this case originated in federal court, that issue likewise is not presented here. We note, however, that this Court rejected a similar argument in *Ruhrgas*. See 526 U.S. at 585-586 (rejecting argument that the district court must rule on a motion to remand for lack of subject matter jurisdiction before dismissing for lack of personal jurisdiction over the defendant).

544 U.S. at 6-7 n.4. See also *In re Arbitration Between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002) (adopting the D.C. Circuit's analysis in *Papandreou* with respect to *forum non conveniens* dismissals).[10]

**D. Permitting Courts To Dismiss on Threshold, Non-Merits Grounds, Such As *Forum Non Conveniens*, Before Adjudicating Complex Jurisdictional Issues Promotes Article III Values**

This Court has "repeatedly emphasized the need to retain flexibility" in the application of the *forum non conveniens* doctrine. *Piper Aircraft*, 454 U.S. at 249. For example, the Court has rejected the contention that a district court should give substantial weight to the possibility that the law of the alternative forum would be less favorable to the plaintiff. *Id.* at 251. The Court explained that the *forum non conveniens* doctrine "is designed in part to help courts avoid conducting complex exercises in comparative law," thereby promoting the public interest in judicial economy. *Ibid.*; see *Gulf Oil*, 330 U.S. at 508-509. The rule embraced by the court of appeals similarly undermines the interests in judicial

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[10] In addition to the decisions of the Second and D.C. Circuits, which the court of appeals noted, Pet. App. 24a-25a, the Sixth Circuit and, subsequent to the court of appeals' decision, the Seventh Circuit have also held that a court may dismiss on *forum non conveniens* grounds before deciding jurisdiction. See *Intec USA, LLC* v. *Engle*,, 2006 WL 3093644, at *2 ("Unlike the majority in *Sinochem*, we do not read [the Seventh Circuit's prior decision in] *Kamel* as committing this court to a rule that subject-matter jurisdiction always must be resolved ahead of *forum non conveniens*."); *Krywicky*, 807 F.2d at 516 (rejecting the plaintiff's argument that "the district court should have withheld consideration and disposition of the *forum non conveniens* motions until after it had resolved the issue of personal jurisdiction").

economy that the doctrine is designed to promote, as well as the judiciary's interest in not becoming unduly enmeshed in foreign controversies or matters with potentially adverse effects on our foreign relations.

There is no evident reason why the district courts (and courts of appeals on review) should be required to expend considerable judicial resources to resolve potentially complicated questions of jurisdiction, when the result of that inquiry would not change the ultimate disposition of dismissal.[11] Such wasted judicial effort and expense should particularly be avoided in cases subject to dismissal based on the *forum non conveniens* doctrine, because there is no substantial reason for those cases to be litigated in United States courts in the first place. That is especially so when jurisdictional litigation, including possible discovery with respect to the issue of personal or subject matter jurisdiction, would likely be extensive and impose upon defendants precisely the types of burdens that the *forum non conveniens* doctrine is intended to avoid. See, *e.g.*, *American Dredging*, 510 U.S. at 448-449.

Indeed, it is difficult to discern any substantial interest that would be advanced by requiring jurisdictional determinations as a prerequisite to a *forum non conveniens* dismissal. The burdens that such a rule would impose on courts and defendants are not counterbalanced by any benefit to plaintiffs. A plaintiff has little to gain by litigating the jurisdictional question. If he loses, the case is dismissed on jurisdictional grounds; if he

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[11] Indeed, the court of appeals noted that it did not reach its holding "without some regret," because requiring a court to establish jurisdiction prior to dismissing for *forum non conveniens* "may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of [judicial] resources." Pet. App. 26a.

wins, the case is dismissed for *forum non conveniens*. In either case, he has expended both time and money in pursuit of a fruitless goal. His only apparent interest in pressing the issue would be to extend the litigation and perhaps prompt a settlement. That interest plainly does not justify the hardships that the rule would impose. Similarly, no interest of the defendant would be served by a rule that required a court to resolve potentially complex issues of subject matter or personal jurisdiction before ruling on the *defendant's* motion to dismiss on *forum non conveniens* grounds.

Moreover, jurisdictional determinations frequently raise constitutional questions, and requiring a court to resolve them when it could dismiss on another non-merits, threshold ground is contrary to the principle of constitutional avoidance. See *Leroy*, 443 U.S. at 181 (deciding question of venue before personal jurisdiction because the jurisdictional question presented a novel constitutional issue).

In other cases, resolution of the jurisdictional inquiry can require the resolution of issues with sensitive foreign relations ramifications even though such pronouncements could be entirely avoided by a dismissal on *forum non conveniens* grounds. For example, in *Turendi* v. *Coca- Cola Co.*, No. 05 Civ. 9635, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), the district court dismissed a suit on *forum non conveniens* grounds, without reaching questions of subject matter and personal jurisdiction, that was brought by Turkish citizens alleging that they had been attacked and tortured by Turkish police at the direction of a Coca-Cola bottling joint venture in Istanbul. *Id.* at *2, *13-*22. The court found that "the case presents immensely complex jurisdictional issues" that would require resolution of "delicate"

questions implicating "United States foreign policy interests" and "the lawfulness of official conduct by foreign government agents." *Id.* at *10, *12.

*Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), illustrates another setting in which resolution of a *forum non conveniens* motion might be appropriate at the threshold, without resolving a difficult jurisdictional issue. The lower courts in *Altmann* rejected a *forum non conveniens* argument, determining that an Austrian court was not an adequate alternative forum because of the plaintiff's age. *Altmann* v. *Republic of Austria*, 317 F.3d 954, 973-974 (9th Cir. 2002), aff'd, 541 U.S. 677 (2004). If the facts bearing on *forum non conveniens* had been only slightly different, a dismissal on that ground might have spared years of litigation about Austria's immunity under the FSIA, which included an exposition by the court of appeals regarding the United States' foreign policy with respect to World War II-era claims against Austria, *id.* at 965-966. Ultimately, the parties agreed to binding arbitration of the dispute in Austria, under Austrian law—a disposition similar to what Austria had long sought under the *forum non conveniens* doctrine. See Austrian Press Agency, *Ambassador Nowotny: Klimt Arbitration Welcomed by U.S. Side* (May 24, 2005) <http://www.austria.org/altpress/327a.html>. In cases that would ultimately be dismissed on *forum non conveniens* grounds in any event, intrusive jurisdictional discovery subjects foreign governments to substantial burdens that are wholly unnecessary. Just as the United States would want to have similar cases filed against it abroad dismissed promptly, foreign governments seek such treatment here.

Like *forum non conveniens*, other non-merits grounds, *e.g.*, international comity, exhaustion, or the

political question doctrine may also prove appropriate threshold bases of dismissal in cases involving foreign claims or parties. See U.S. Br., *Mujica* v. *Occidental Petroleum Corp.*, No. 05-56056 (9th Cir. filed Mar. 20, 2006) (urging affirmance of dismissal on international comity grounds without deciding whether the court's jurisdiction under the ATS extends to claims that arise extraterritorially); *Sarei* v. *Rio Tinto, PLC.*, 456 F.3d 1069, 1100-1122 (9th Cir. 2006) (Bybee, J., dissenting) (arguing that the court of appeals should have declined to reach jurisdictional issues relating to the scope of the ATS on the ground that the suit should be dismissed without prejudice until the plaintiffs had exhausted remedies available in the foreign forum); *Hwang Geum Joo* v. *Japan*, 413 F.3d 45, 47-48, 52-53 (D.C. Cir. 2005) (dismissing on political question grounds an action by Korean, Chinese, and Philippine women alleging that the Japanese army subjected them to sexual slavery during World War II, without resolving whether Japan's alleged conduct would be "commercial activity" within the meaning of the FSIA), cert. denied, 126 S. Ct. 1418 (2006).[12] Cf. *Tenet*, 544 U.S. at 7 n.4 (to "allow discovery

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[12] The District of Columbia Circuit held that the political question doctrine can be addressed before subject matter jurisdiction under the FSIA because the political question doctrine is a "jurisdictional limitation[]." *Hwang Geum Joo*, 413 F.3d at 47 (citation omitted). There is, however, some uncertainty "whether dismissal on political question grounds is jurisdictional or prudential in nature." *Arakaki* v. *Lingle*, 423 F.3d 954, 962 (9th Cir. 2005), vacated and remanded on other grounds, 126 S. Ct. 2859 (2006). See *Goldwater* v. *Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) ("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government."). Either way, however, treatment of the political question doctrine as a threshold issue for *Steel Co.* purposes clearly serves the interests that underlie the *Steel Co.* and

or other proceedings in order to resolve the jurisdictional question" would defeat the purposes of the *Totten* bar to suits based on secret espionage agreements).

The inflexible rule adopted by the court of appeals would force the federal courts to resolve even difficult jurisdictional issues with potentially significant implications for the Nation's foreign relations before dismissing a case in favor of a more appropriate forum in the country in which the claims arose. Although the court of appeals believed itself to be constrained by principles of judicial restraint rooted in Article III, see Pet. App. 26a, its approach undermines, rather than furthers, separation of powers interests that this Court has often acknowledged. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) (noting that "the potential implications for the foreign relations of the United States of recognizing" causes of action for violating international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").[13]

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Ruhrgas* decisions as well as the foreign policy interests of the United States.

[13] The United States does not suggest that litigation of the present case in federal district court would adversely affect our foreign relations. However, the court of appeals' categorical rule that jurisdictional questions must be resolved before a court may abstain from exercising jurisdiction under a discretionary doctrine such as *forum non conveniens* would deny courts the flexibility necessary to deal with cases that do present foreign affairs concerns.

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